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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JOHN P. REDDINGTON,
Petitioner,

v.

OTIS R. BOWEN, Secretary of
Health and Human Services,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE SECRETARY OF HEALTH AND HUMAN SERVICES' REGULATIONS BE INTERPRETED TO ALLOW THE SECRETARY TO "REOPEN" PETITIONER'S FAVORABLE SOCIAL SECURITY BENEFIT DETERMINATION AFTER THE SIXTY-DAY PERIOD FOR "REVIEW" OF THAT DETERMINATION HAD EXPIRED?

II. IF THE SECRETARY'S REGULATIONS ARE INTERPRETED TO ALLOW THE SECRETARY TO "REOPEN" PETITIONER'S SOCIAL SECURITY BENEFIT DETERMINATION AFTER THE SIXTY-DAY PERIOD FOR "REVIEW" OF THAT DETERMINATION HAD EXPIRED, WOULD AN "ERROR OF LAW" OR "ABUSE OF DISCRETION" BY THE ADMINISTRATIVE LAW JUDGE CONSTITUTE "GOOD CAUSE" TO REOPEN THE DETERMINATION FAVORABLE TO THE PETITIONER?

III. SHOULD PETITIONER'S EARNINGS RECORD FOR SOCIAL SECURITY OLD-AGE INSURANCE BENEFITS HAVE BEEN CREDITED WITH HIS EARNINGS DERIVED FROM HIS WORK ACTIVITIES AS MANAGER AND SUPERVISOR OF A PARTNERSHIP THAT OWNED AND OPERATED AN APARTMENT COMPLEX WHEN PETITIONER WAS A PARTNER IN THAT PARTNERSHIP?

IV. SHOULD PETITIONER'S EARNINGS RECORD FOR SOCIAL SECURITY OLD-AGE INSURANCE BENEFITS BE CREDITED WITH QUARTERS OF COVERAGE HE EARNED PRIOR TO 1951?

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JOHN P. REDDINGTON,
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OTIS R. BOWEN, Secretary of
Health and Human Services,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, John R. Reddington, respectfully prays that a writ of certiorari issue from this Court to review the judgments, opinions and orders of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on July 23, 1987 and August 26, 1987.

OPINIONS BELOW

The unpublished opinion of the Fourth Circuit Court of Appeals is reproduced in Appendix A, *infra*, at pp. 1a-3a. The unpublished Order of the Fourth Circuit Court of Appeals, filed August 26, 1987, denying the petition for rehearing and suggestion for rehearing in banc is reproduced as Appendix E, *infra*, p. 39a. The published decision of the United States District Court for the

Eastern District of North Carolina is published, see *Reddington v. Bowen*, 640 F.Supp. 1005 (E.D.N.C. 1986), and reproduced as Appendix B, *infra*, at pp. 4a-16a.

JURISDICTION

The decision in the United States Court of Appeals was decided and entered on July 23, 1987 (Appendix A, *infra*, pp. 1a-3a). The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing in banc was filed on August 26, 1987 (Appendix E, *infra*, p. 39a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves those portions of the Social Security Act granting the Secretary

> "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of [the disability benefits program of the Act], which are necessary or appropriate to carry out such provisions" and directs him to adopt "rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases (42 U.S.C. 405(a)."

The Secretary's regulations, as follows, also are involved:

> *404.969 Appeals Council initiates review*
>
> "Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address." (20 C.F.R. 404.969)

404.970 Cases the Appeals Council will review.

"(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

(b) If new and material evidence is submitted with the request for review, the Appeals Council shall evaluate the entire record. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently in the record." (20 C.F.R. 404.970)

404.987 Reopening and reviewing determinations and decisions.

"(a) General. Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review. However, a determination or decision made in your case may be reopened and revised. After we reopen your case, we may revise the earlier determination or decision.

(b) Procedure for reopening and revision. You may ask that a determination or a decision to which you were a party be revised. The conditions under which we will reopen a previous determination or decision are explained in 404.988." (20 C.F.R. 404.987)

404.988 Conditions for reopening.

"A determination, revised determination, decision, or revised decision may be reopened—

(a) Within 12 months of the date of the notice of the initial determination for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in 404.989, to reopen the case; or "(20 C.F.R. 404.988)

404.989 Good Cause for reopening

Good cause for reopening exists when:

"(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made." (20 C.F.R. 404.989(a).

STATEMENT OF THE CASE

On December 16, 1981 Petitioner applied for retirement insurance in anticipation of retirement upon his reaching the age of 62 on March 14, 1982. His claim for benefits, however, was denied initially and on reconsideration because he supposedly lacked sufficient quarters of coverage to be "fully insured" under the Social Security Act (hereafter the "Act"). His claim was denied based upon a determination that his income for the years 1978, 1979 and 1980 was net earnings from the rentals of real estate and could not be the basis for the award of quarters of coverage for those years. Petitioner made a timely request for a hearing, and the Administrative Law Judge ("ALJ") stated that the issue before him at that hearing was:

> ". . . whether the claimant is entitled to old-age insurance benefits which depends, in part, on whether he had the prerequisite quarters of coverage to be fully insured for such benefits. Specifically at issue is whether the claimant's earnings record may be credited with wages or self employment income for the years 1978, 1979 and 1980." (Appendix C, *infra*, p. 19a)

Following the hearing conducted by the ALJ on February 25, 1983 the decision of the ALJ, favorable to the claimant, was mailed on May 23, 1983. (Appendix C, *infra*, pp. 17a-29a). In this decision the ALJ made and reached the following findings and conclusions:

> "The Administrative Law Judge concludes that Mr. Reddington was, in effect, an employee of the partnership with respect to his duties as a manager. He does not believe that a partner can never be an employee of a partnership. In this situation, Mr. Reddington performed duties which were not performed by the other partners, for which he received specific compensation as set out in the partnership agreement. Mr. Reddington has been somewhat inconsistent in his own characterization of the relationship but at times he has characterized his income as wages and salary. GMA has been somewhat inconsistent with respect to how it reports its payments to Mr. Reddington for tax purposes but, the accountant, Ms. Dees, stated that the payments to Mr. Reddington were made along with the other expenses of GMA, separate from and prior to any distribution to the partners. The factors indicating that Mr. Reddington was not an independent contractor tend to indicate that he was an employee. The fact that GMA paid Mr. Reddington as it paid its other employee, the fact that Mr. Reddington was provided an apartment to use as an office, and the fact that Mr. Reddington deducted only his personal expenses for tax purposes, all tend to support this conclusion. In addition, Mr. Reddington ac-

knowledged that he prepares weekly and monthly reports to the other partners (Exhibit 15). The ultimate test of whether a business relationship is one of employee and employer is that of control. Mr. E. C. Powell testified at the hearing that he had never given Mr. Reddington an Order. The real issue is whether Mr. Powell could control Mr. Reddington's activities as a manager if he chose to do so. The partnership agreement for GMA gives the Powells authority to discharge Mr. Reddington from his manager role on 60 days notice with no other requirements despite the fact that Mr. Reddington is a partner. This fact of the ultimate control, in combination with the other factors identified above, support the Administrative Law Judge's conclusion that Mr. Reddington was an employee of GMA. The complexity and vagueness of the role that Mr. Reddington played with the partnership do not result in an overwhelmingly clear picture of the relationship but the factors above establish that the relationship of an employee to an employer is more likely and more logical than the other possibilities. Thus, Mr. Reddington's income for the years 1978, 1979, and 1980, was wages and was more than sufficient to give him quarters of coverage to meet the "fully insured" requirement. (Appendix C, *infra*, pp. 27a-28a).

As has been noted previously, the ALJ's decision was rendered and mailed to the Petitioner on May 23, 1983. It appears that, under a memorandum dated June 20, 1983, the Office of the Director of Operations for the Northeastern Program Service Center of the Reconsideration Branch sent the Department of Health and Human Services, Social Security Administration Office of Hearings and Appeals a communication noting that the ALJ's "decision is clearly contrary to the act and regulations". (Appendix H, *infra*, pp. 46a-47a). It appears, however, that the Appeals Council failed to communicate with Petitioner until November 8, 1983 with

a status report advising Petitioner that the Appeals Council was considering whether the ALJ's decision should be reopened, citing as its authority 20 C.F.R. Section 988(b) and Section 404.989. By letter dated December 9, 1983 the Appeals Council advised Petitioner that it was reopening the ALJ's decision of May 23, 1983 under authority of section 404.988(b) and 404.989 (a)(3) of Social Security Administrations Regulations No. 4 (20 C.F.R. 404.988(b) and 404.989(a)(3), because the ALJ's decision "contains an error on the face of the evidence on which it was based." (Appendix G, *infra*, pp. 43a-45a). The Appeals Council, on January 24, 1984, issued its decision reversing the ALJ's decision of May 23, 1983. (Appendix D, *infra*, pp. 32a-38a).

From that adverse decision of the Appeals Council the Petitioner, after time had been extended by the Appeals Council, instituted this action in the District Court on October 3, 1984 petitioning for review of administrative action and for relief in the nature of mandamus to compel the Secretary to commence payment of his Social security retirement insurance benefits in accordance with the ALJ's decision that had been rendered on May 23, 1983. The complaint sought relief in the nature of mandamus because the appeals Council had failed to act within sixty (60) days after rendition of the decision of the ALJ, and the petition further alleged that the Appeals Council had improperly computed Claimant's quarters of coverage for the years 1978, 1979 and 1980 by applying erroneous legal standards. Finally, the petition alleged that the final decision of the Secretary was not supported by substantial evidence. Motions for summary judgment, supported by memoranda and the required transcript of administrative proceedings were filed and the District Judge conducted a hearing on the cross-motions for summary judgment on March 14, 1986. On August 4, 1986 the District Judge's Order granting the Secretary's Motion for Summary Judgment was filed,

and the decision of the Secretary, in the form of the decision of the Appeals Council, was affirmed. (Appendix B, *infra*, pp. 4a-16a).

In his Order the District Judge acknowledged the difficult issues presented by this case and noted:

> "It is a close question whether GMA's income for the years 1978 through 1980 constitute self-employment income or rental income. The tedious task of discerning between services rendered to occupants and services rendered solely to make space available for occupancy is further compounded by case law which is neither clear nor exhaustive in treating this particular subject matter." (Appendix B, *infra*, p. 13a).

The District Court then went on to uphold the Secretary's denial of benefits to Petitioner on a separate legal ground that had not been discussed in the decisions of either the Appeals Council or the ALJ. The District Court discussed its reasoning as follows:

> "However, the court need not resolve these complex issues. There exists a separate legal ground which mandates that the Secretary's denial of benefits be affirmed. Therefore, the court affirms the Appeals Council decision on a separate and distinct legal ground.
>
> 3. *Computation of Claimant's NESE for 1978-1980*
> Assuming, *arguendo*, that claimant's income for the years 1978 through 1980 is "self-employment income," as that term is defined in the Act, the court must proceed to determine whether claimant's NESE was of a sufficient amount for these years to entitle him to quarters of coverage for that time period. A close view of the record in this case reveals that for at least 1979 and 1980 claimant's guaranteed payments were offset by his distributive share of losses incurred from partnerships of which he was a member. *See* 42 U.S.C. 411(a). Accordingly, claimant at most is entitled to four quarters of coverage for the

> years 1978 through 1980. This number would provide claimant with at most twenty-eight quarters of coverage, still leaving him ineligible to receive social security old-age insurance benefits. Accordingly, the Secretary's decision must be affirmed on this separate legal ground." (Appendix B, *infra*, p. 14a).

From that District Court decision Petitioner duly noted his appeal to the United States Court of Appeals for the Fourth Circuit on September 26, 1986. In an unpublished opinion filed on July 23, 1987 the decision of the District Court was affirmed. (Appendix A, *infra*, pp. 1a-3a). One of the Judges on that panel, however, noted in a concurring opinion:

> "In *Zimmermann v. Heckler*, 774 F.2d 615 (4th Cir. 1985), this Court permitted the Appeals Council to reopen the decision of the Administrative Law Judge, holding—
>
> > The Appeals Council, however, is empowered to reopen, within four years of the date of the notice of the initial determination, any determination if 'good cause' exists, 20 C.F.R. 404.988 (b) (1985).
>
> In *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987), the Court clearly states that the right to reopen for 'good cause' is restricted to the claimant.
>
> ---
>
> Thus, a conflict in circuits has arisen. No individual panel of this Court may overrule a prior holding of the Court. Since I am bound by the *Zimmermann* ruling, I concur." (Appendix A, *infra*, p. 3a).

Because of the conflict in the circuits concerning the Secretary's right to reopen administrative decisions after expiration of the sixty (60) day review period, Petitioner timely filed a petition for rehearing and suggestion for rehearing in banc in the Court of Appeals; nonetheless, in an Order filed on August 26, 1987 the petition for rehearing and suggestion for rehearing in banc were

denied. (Appendix E, *infra*, pp. 39a-40a). Petitioner's motion that the mandate be stayed pending application to this Court for a writ of certiorari based upon the conflict in the circuits also was denied. As provided in 28 U.S.C. 210(c) and Rules 20.2 and 20.4 of the Supreme Court Rules this petition for certiorari is being filed within ninety (90) days from August 26, 1987, the date on which the petition for rehearing and suggestion for rehearing in banc were denied.

REASONS FOR ALLOWING THE WRIT

I. THE SECRETARY OF HEALTH AND HUMAN SERVICES' REGULATIONS SHOULD NOT BE INTERPRETED TO ALLOW THE SECRETARY TO "REOPEN" PETITIONER'S FAVORABLE SOCIAL SECURITY BENEFIT DETERMINATION AFTER THE SIXTY-DAY PERIOD FOR "REVIEW" OF THAT DETERMINATION HAD EXPIRED.

The unpublished per curiam decision of the Fourth Circuit Court of Appeals herein on July 23, 1987 is in direct conflict with both the decision of the First Circuit Court of Appeals in *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987) and the decision of the Eleventh Circuit Court of Appeals in *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986). In his concurring opinion Judge Hoffman noted this conflict.

Rule 17 of the Supreme Court Rules discusses considerations governing review on certiorari as follows:

> "1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (A) When a federal court of appeals has rendered a decision in conflict with the decision of

> another federal court of appeals on the same matter; . . . "

Moreover, the First Circuit's decision in *McCuin v. Secretary of Health and Human Services, supra,* was based on "special and important reasons", because it held, for the first time in a United States Court of Appeals,

> "in view of the *serious substantive and procedural due process problems* that would result from the Secretary's reading of the regulations, we conclude that they should be interpreted as allowing reopening only on the basis of motions by claimants." (Emphasis supplied) (817 F.2d at 174).

Recently, the Fifth Circuit Court of Appeals joined the Fourth and Eighth Circuits in adopting the Secretary's interpretation of section 404.988 that the Appeals Council may reopen determinations upon its own initiative after expiration of the sixty-day time limit for "review" pursuant to 20 C.F.R. Section 404.969. See *Cieutat v. Bowen,* 824 F.2d 348 (5th Cir. 1987). In its analysis of the issue the Fifth Circuit described the conflict in the circuits as follows:

> "Other circuits that have faced this issue have reached irreconcilable conclusions about how the regulations should be interpreted." (824 F.2d at 356).

It appears that between August 14, 1986 and August 3, 1987 this issue has been the subject of four cases in four different circuits: see *Butterworth v. Bowen,* 796 F.2d 1379 (11th Cir. 1986); *McCuin v. Secretary of Health and Human Services, supra*; the decision to which this petition for writ of certiorari is directed; and *Cieutat v. Bowen, supra.* Unquestionably, a question of obvious national importance is presented, for the Social Security System is sacrosanct and there is an overriding need for uniform interpretation of the regulations promulgated by the Secretary to carry out the provisions of the Act.

There are at least four different interpretations taken on the question of who may initiate the reopening procedure described in 20 C.F.R. section 404.987-989. First, there is the position to which this application for writ of certiorari is directed that the Appeals Council may "reopen" of its own accord. In addition to the Fourth Circuit below and in *Zimmermann v. Heckler*, *supra*, this position has been adopted by the Eighth Circuit in *Munsinger v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983) and *Higginbotham v. Heckler*, 767 F.2d 408, 410 (8th Cir. 1985) and the Fifth Circuit in *Cieutat v. Bowen*, *supra*. Second, there is the interpretation that only the claimants may initiate the reopening procedure adopted by the courts in *McCuin v. Secretary of Health and Human Services*, *supra*; and *Silvis v. Heckler*, 578 F. Supp. 1401 (W.D.Pa. 1984). *Cf.*, *Delong v. Heckler*, 771 F.2d 266 (7th Cir. 1985). Third, there is the "components" analysis adopted by the Eleventh Circuit in *Butterworth v. Bowen*, *supra*, that while the Social Security Administration could initiate reopening, only that component of the Administration which had made the decision or which had the decision properly before it for review could initiate the reopening procedure. Fourth, courts have attempted to distinguish between errors of fact and error of law. *See Call v. Heckler*, 647 F. Supp. 560 (D. Mont. 1986). Under this interpretation the Appeals Council could reopen on its own initiative on the basis of errors of fact, but would be barred from *sua sponte* reopening for errors of law.

In *McCuin v. Secretary of Health and Human Services*, *supra*, the Court observed

> "We note that the Social Security Act, under whose authority the regulations were promulgated, is a remedial statute, to be broadly construed and liberally applied in favor of beneficiaries . . . We find that it would frustrate congressional objective in passing such a statute if the ambiguity in the regulations were to be resolved in favor of putting claim-

> ants in a state of limbo for at least four years, uncertain of the final outcome of their cases. In effect, the Secretary seeks to interpret 404.987's statement that "you," the claimant, may seek reopening as meaning that "we," the Appeals Council, may do so as well. This interpretation results in lack of finality and in the issuance of inevitably misleading notices constructed through selective quotation of ambiguous regulations. This significantly negates the beneficient purposes of the statute." (Citations omitted) (817 F.2d at 174)

Because of the pronounced conflict in the circuits, the frequency with which this question is being presented, the obvious need for a uniform national interpretation, and the "beneficent purposes" of the Act, this Court should allow the writ of certiorari.

II. EVEN IF THE SECRETARY'S REGULATIONS ARE INTERPRETED TO ALLOW THE SECRETARY TO "REOPEN" PETITIONER'S SOCIAL SECURITY BENEFIT DETERMINATION AFTER THE SIXTY-DAY PERIOD FOR "REVIEW" OF THAT DETERMINATION HAD EXPIRED, AN "ERROR OF LAW" OR "ABUSE OF DISCRETION" BY THE ADMINISTRATIVE LAW JUDGE DOES NOT CONSTITUTE "GOOD CAUSE" TO REOPEN THE DETERMINATION FAVORABLE TO THE PETITIONER.

The ALJ carefully and painstakingly reviewed all the evidence and he properly focused on the factor of control in the business relationship among petitioner and his partners. That factor of the right to control is determinative under North Carolina law of the relationship between the parties. See *8 N. C. Index 3d*, Master & Servant 3. The memorandum which prompted the Appeals Council to reopen the ALJ's decision is dated June 20, 1983, less than 30 days after the ALJ's May 23, 1983 decision, but the Appeals Council waited until December 9, 1983 to advise Petitioner that it was reopening the ALJ's May 23, 1983 decision. (Appendices G & H,

infra, pp. 43a-47a). The basis of the Appeals Council's decision was its reversal of the ALJ's conclusion that Petitioner "was, in effect, an employee of the partnership with respect to his duties as a manager. He [the ALJ] does not believe that a partner can never be an employee of a partnership." (Appendix C, *infra*, p. 27a). This conclusion by the ALJ involved a question of law, not a factual finding; hence, it was reviewable by the Secretary under 20 C.F.R. 404.970(a)(2), if at all. The only other ground for review would have been an abuse of discretion by the ALJ which would have been reviewable under 20 C.F.R. 404.970(a)(1).

With timely notice that the ALJ had determined that the claimant had been paid wages as an employee of the partnership of which he was a partner for the years in question the Appeals Council failed to initiate a review within 60 days of the hearing decision, and the Secretary should not be permitted to avoid the 60-day time limit on *sua sponte* reviews by attempting to stretch the reopening regulations to embrace the express grounds for review set forth in 20 C.F.R. 404.970(a)(1) and (a)(2). Under 20 C.F.R. 404.989, the reopening regulation, the Appeals Council simply should not be empowered to review an error of law or an abuse of discretion by the ALJ. *See Call v. Heckler*, *supra*.

III. PETITIONER'S EARNINGS RECORD FOR SOCIAL SECURITY OLD-AGE INSURANCE BENEFITS SHOULD HAVE BEEN CREDITED WITH HIS EARNINGS DERIVED FROM HIS WORK ACTIVITIES AS MANAGER AND SUPERVISOR OF A PARTNERSHIP THAT OWNED AND OPERATED AN APARTMENT COMPLEX WHEN PETITIONER WAS A PARTNER IN THAT PARTNERSHIP.

In *Delno v. Celebreeze*, 347 F.2d 159, 9th Cir. 1965), the Ninth Circuit discussed the purposes of the old-age insurance provisions of the Act and the construction of the "service to occupant" exception as follows:

> "The general purpose of the old-age, survivor and disability insurance provisions of Title II of the Social Security Act is to protect workers and their dependents from the risk of loss of income due to the insured's old age, death, or disability. Accordingly, entitlement to benefits is based upon the receipt of income from labor, which old age, death, or disability would interrupt; and not upon the receipt of income from the investment of capital, which these events would presumably not affect. The ultimate problem in this case is to determine whether the statutory provisions and interpretative regulations which have been drawn with this general distinction in mind require that the payment which appellant received be treated as investment income rather than income from labor. (347 F.2d at 161).

After acknowledging the complexity of the issues presented by claimant's case, the District Judge affirmed the Secretary's denial of benefits for Petitioner on the separate legal ground that for at least 1979 and 1980, claimant's guaranteed payments from GMA were offset by his distributive share of losses incurred from partnerships of which he was a member. This ground was one that had not been discussed in the decision of the Appeals Council.

The ALJ made critical findings of fact after hearing and observing the demeanor of the witnesses at the hearing. His conclusion that Petitioner "was, in effect, an employee of the partnership with respect to his duties as a manager" correctly reflects Petitioner's status and the character of the income he received for his labor in managing the day-to-day operations of the apartment complex.

IV. PETITIONER'S EARNINGS RECORD FOR SOCIAL SECURITY OLD-AGE INSURANCE BENEFITS SHOULD BE CREDITED WITH QUARTERS OF COVERAGE HE EARNED PRIOR TO 1951.

The Court of Appeals declined to rule on Petitioner's contention that he is entitled to 11 quarters of coverage for years prior to 1951 observing that Petitioner "is not precluded from seeking correction of his earnings records for those years prior to 1951 pursuant to 42 U.S.C.A. 405(c)". (Appendix A, *infra*, p. 3a). At oral argument in the Court of Appeals the Secretary's counsel argued, however, that Petitioner would be barred from seeking correction of his earnings records prior to 1951. To prevent injustice to Petitioner this Court should determine, based upon the Secretary's own records, that Petitioner is entitled to 11 quarters of coverage for years prior to 1951.

In his evaluation of the evidence, the ALJ determined that:

> "Prior to the elimination of the quarters of coverage awarded for 1978, 1979 and 1980, Mr. Reddington's certified earnings record (Exhibit 9), showed that he had at least 36 quarters of coverage, counting quarters of coverage at issue in this case for the years 1978, 1979 and 1980. (Appendix C, *infra*, p. 21a).

The Appeals Council disagreed with the ALJ on the total number of quarters of coverage with which Petitioner should be credited, stating in its decision:

> "The Appeals Court notes that the crediting of 12 quarters of coverage for 1978 through 1980 would result in the claimant having only 27 of the 31 quarters of coverage he needs to be fully insured." (Appendix D, *infra*, p. 35a).

The Appeals Council made a finding that "the claimant has acquired only 15 quarters of coverage through

1980, whereas he needs 31 quarters of coverage to be fully insured." (Appendix D, *infra*, p. 37a).

The Appeals Council and the ALJ agree that Petitioner is entitled to credit for 15 quarters of coverage for 1974, 1975, 1976 and 1977. Disregarding the 12 quarters of coverage at issue for the years 1978, 1979 and 1980, the difference in these calculations concerns the quarters of coverage for which Petitioner should be credited prior to 1974.

Petitioner's military service prior to 1951 was determined not creditable for Social Security purposes inasmuch as Petitioner was receiving a benefit from another federal agency on the basis of that service. What the Appeals Council and the Social Security Administration in its Reconsideration Decision ignored, however, was Petitioner's quarters of coverage earned for his employment prior to his military service. Based upon Petitioner's Transcript of Earnings Record, it appears that he was entitled to credit for one (1) quarter of covered employment in 1938; four (4) quarters in 1939; and four (4) quarters in 1940 for a total of nine (9) quarters of coverage prior to 1974. These nine (9) quarters of coverage are the difference between the findings of the ALJ and those of the Appeals Council, for the Appeals Council noted that if Petitioner were credited with the twelve (12) quarters of coverage for 1978, 1979 and 1980, he would have had twenty-seven (27) quarters of coverage while the ALJ found that he had at least thirty-six (36) quarters of coverage. It further appears that the ALJ disregarded quarters of coverage in 1941 and 1943 for which Petitioner might have been entitled to credit to insure that no part of the military service that served as a basis of a benefit Petitioner was receiving from another federal agency would be included in the quarters of coverage creditable for Petitioner's Social Security purposes; hence, the ALJ determined that Petitioner "had at *least* thirty-six quarters of coverage, counting quarters of cov-

erage he earned before 1951". (Appendix C, *infra*, p. 21a). The Act does provide that individuals can be credited with quarters of coverage for each year after 1936, and Petitioner received benefits from federal agencies other than the Social Security Administration for his military service and his service as a foreign service officer for a 33-year period that ended on March 31, 1974.

It thus appears that the ALJ's determination that Petitioner "had at least 36 quarters of coverage, including quarters of coverage he earned before 1951 and the twelve quarters of coverage at issue in this case for the years 1978, 1979 and 1980" is correct based upon "the evidence that was considered in making the determination or decision". In view of this express determination by the ALJ it is difficult to understand why the District Court and the Court of Appeals declined "to rule on this issue since it was not properly raised in the administrative proceedings." (Appendix A, *infra*, p. 3a; and see Appendix B, *infra*, p. 9a (Note 3)).

CONCLUSION

Because of the conflict in the circuits concerning the interpretation of the Secretary's regulations governing "review" and "reopening" of Social Security benefit determinations and for the reasons above set forth, the Petitioner respectfully prays that this Court issue its writ of certiorari to review the judgment and opinion entered in this case by the United States Court of Appeals for the Fourth Circuit.

This the 21st day of November, 1987.

JACK BENJAMIN CRAWLEY, JR.
200 Bracken Court
Post Office Box 97155
Raleigh, NC 27624-7155
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Counsel of Record
for the Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3625

JOHN P. REDDINGTON,
Plaintiff-Appellant

v.

OTIS R. BOWEN,
Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of North Carolina, at New Bern
Terrence W. Boyle, District Judge—(CA-85-82-2)

Argued: May 5, 1987 Decided: July 23, 1987

Before HALL and WILKINS, Circuit Judges, and HOFFMAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Jack Benjamin Crawley, Jr. (Walter J. Early; Early & Chandler on brief) for Appellant; Stanley Ericsson, Office of the General Counsel, Department of Health &

Human Services (Richard K. Willard, Assistant Attorney General; Donald A. Gonya, Assistant General Coun-Counsel; Randolph W. Gaines, Deputy Assistant General Counsel for Litigation; John M. Sacchetti, Chief, Retirement and Survivors Insurance Litigation Branch on brief) for Appellee.

PER CURIAM:

John P. Reddington appeals from the order of the district court affirming the denial by the Secretary of old-age insurance benefits on the basis that he is not fully insured. We affirm.

To be fully insured and eligible for benefits, Reddington must have 31 quarters of coverage. It is uncontested that he has 15 quarters for the period from 1974 to 1976. In dispute are 12 quarters for the years 1978 through 1980 and 11 quarters fo employment prior to 1951.

The administrative la.. judge found that Reddington was entitled to the 12 quarters for 1978 through 1980 and 9 quarters prior to 1951 and concluded that he was fully insured with at least 36 quarters of coverage. The Appeals Council reopened the case on its own motion and denied benefits, finding that Reddington had only 15 quarters of coverage and was thus not fully insured. The district court found that the Appeals Council properly reopened the decision of the ALJ and affirmed the denial of benefits.

On appeal, Reddington asserts that the Secretary did not have the authority to reopen the case and that he is entitled to the 12 quarters of coverage for 1978 through 1980. We affirm on the sound reasoning of the district court. *Reddington v. Bowen*, 640 F.Supp. 1005 (E.D.N.C. 1986).

Reddington also contends on appeal that he is entitled to 11 quarters of coverage for years prior to 1951. We

decline to rule on this issue since it was not properly raised in the administrative proceedings. *See Reddington*, 640 F. Supp. at 1108 n.3. Reddington is not precluded from seeking correction of his earnings records for those years prior to 1951 pursuant to 42 U.S.C.A. § 405 (c) (West 1983 & Supp. 1987). Further, he is free to reapply for benefits and seek entitlement for any quarters of coverage acquired since 1980.

AFFIRMED.

HOFFMAN, District Judge, concurring:

In *Zimmerman v. Heckler*, 774 F.2d 615 (4th Cir. 1985), this Court permitted the Appeals Council to reopen the decision of the Administrative Law Judge, holding—

> The Appeals Council, however, is empowered to reopen, within four years of the date of the notice of the initial determination, any determination if "good cause" exists. 20 C.F.R. § 404.988(b) (1985).

In *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987), the Court clearly states that the right to reopen for "good cause" is restricted to the claimant.

Thus, a conflict in circuits has arisen. No individual panel of this Court may overrule a prior holding of the Court. Since I am bound by the *Zimmerman* ruling, I concur.

APPENDIX B

Note: Reported in 640 F. Supp. 1005.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA NEW BERN DIVISION

No. 84-104-CIV-4

JOHN P. REDDINGTON,
Petitioner,

v.

OTIS R. BOWEN, Secretary, Health and Human Services,
Respondent.[1]

[Filed Aug. 4, 1986]

ORDER

Petitioner John P. Reddington (claimant) filed this action pursuant to 42 U.S.C. § 405(g) challenging the final decision of the Secretary of Health and Human Services denying him old-age insurance benefits under Title II of the Social Security Act (the Act). The claimant also seeks mandamus relief pursuant to 28 U.S.C. § 1361. The case is before the court on the parties' cross-motions for summary judgment. Because the court finds that substantial evidence supports the Secretary's final decision, in the form of an Appeals Council's ruling, respondent's motion for summary judgment is granted and the Secretary's decision is affirmed.

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[1] Dr. Otis R. Bowen is substituted as a party in this suit in place of Margaret Heckler pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

I.

Claimant applied for Social Security old-age insurance benefits on December 16, 1981. A claimant must be "fully insured" in order to receive these benefits. 42 U.S.C. § 402(a). A claimant becomes "fully insured" by accumulating a requisite number of "quarters of coverage" in employment covered under the Act. 42 U.S.C. § 414. Only self-employment and wage income are considered in determining how many quarters of coverage an individual has accumulated. 42 U.S.C. § 413. All parties agree that claimant needs thirty-one quarters of coverage in employment covered by the Act in order to be fully insured within the meaning of § 402.

Claimant's application for benefits was denied by the Social Security Administration and he was granted a hearing before an Administrative Law Judge (ALJ) in May, 1983. The ALJ concluded that claimant was fully insured, finding that he possessed at least thirty-six quarters of coverage. The ALJ noted that the issue before him was whether claimant's income during the years 1978 through 1980 was "wages" or self-employment income so as to entitle claimant to twelve additional quarters of coverage. The judge found claimant entitled to fifteen quarters of coverage for the years 1974 through 1976, nine quarters for employment prior to 1951, and twelve quarters for the years 1978 through 1980.

The ALJ's decision was handed down on May 23, 1983. The Social Security Administration (SSA) did not appeal from this determination. Approximately six months later, in December, 1983, the Office of Hearings and Appeals notified claimant that the Appeals Council was reopening his case *sua sponte* on the grounds that evidence considered by the ALJ clearly showed that an error was made in adjudicating claimant's claim. *See* 20 C.F.R. §§ 404.988(b), 404.989(a)(3). On January 24, 1984, the Appeals Council reviewed the ALJ's ruling and held that the claimant was not entitled to old-age benefits because

he did not possess the necessary quarters of coverage. The Appeals Council found that claimant possessed only fifteen quarters of coverage, i.e., from March, 1974 through December, 1977. Claimant then commenced the present civil action in this court on October 3, 1984.

II.

The court is called upon to determine whether the Appeals Council properly computed claimant's quarters of coverage for the fiscal years 1978, 1979 and 1980. Claimant maintains that the ALJ correctly included these twelve quarters in computing his total number of quarters of coverage. The Secretary contends that substantial evidence exists in the record to support the Appeals Council's exclusion of these twelve quarters.

During the years 1978, 1979 and 1980, Reddington performed services in connection with the operation of apartment complexes owned by a partnership doing business as Greenmount Associates (GMA). Claimant was a general partner in this partnership, as well as in two other partnerships, i.e., Rose Hill Associates (RHA) and Rose Hill Associates Water Company (RHAWC) during the years 1978, 1979 and 1980. Pursuant to a partnership agreement dated October 15, 1975, claimant received specific payments from GMA for managing the apartment complexes in addition to receiving a distributive share of the profits or losses incurred by the partnership. Claimant's specific payments for his services were payable without regard to partnership income and did not affect his distributive share of partnership income or loss. Claimant's income tax records indicate he received payments for services from GMA in the amounts of $15,360, $14,080 and $16,640 for the years 1978, 1979 and 1980, respectively. GMA operated at a loss for the fiscal years 1978 through 1980. RHWAC operated at a loss for the fiscal years 1979 and 1980.

The ALJ determined that the relationship between claimant and GMA was that of employer and employee notwithstanding claimant's status as a general partner in the employer-partnership. On these facts, the ALJ found the income for claimant's employment during the years 1978, 1979 and 1980 to be "wages" qualifying the claimant for an additional twelve quarters of coverage towards the thirty-one needed for eligibility.

The Appeals Council reopened and reversed the ALJ and found that the claimant's income for the years 1978, 1979 and 1980 could not be characterized as "wages" because claimant, as a general partner of GMA, was the employer and therefore could not be an employee of the partnership. The Appeals Council also ruled that income reported for these years was not self-employment income under the Act. The Appeals Council found that GMA's income was "rental income" within the meaning of 42 U.S.C. § 411(a)(1). The Council then concluded that GMA's payments to claimant for his managerial efforts were merely "guaranteed payments" of the same nature and quality as GMA's partnership income, i.e., "rental income." Thus, the Appeals Council excluded those payments from self-employment earnings pursuant to 42 U.S.C. § 411(a)(1) and 20 C.F.R. § 404.1082(d).

III.

This case presents several issues for resolution. The first issue is whether the Appeals Council can reopen a decision *sua sponte* when that decision was resolved in a claimant's favor. Second, the court must determine whether claimant's income for the years 1978, 1979 and 1980 was properly excluded in computing his quarters of coverage for old-age insurance purposes. Third, the court must determine whether mandamus relief is warranted in this case.

A. *Reopening of Cases Sua Sponte*

The first issue is quickly resolved. The Appeals Council is empowered to reopen a case *sua sponte* within four years of the date of initial determination if "good cause" exists. 20 C.F.R. § 404.988(b) (1985). *See also Zimmerman v. Heckler*, 774 F.2d 615, 617 (4th Cir. 1985). Good cause to reopen exists when "[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made." 20 C.F.R. § 404.989(a)(3) (1985). The error may be legal or factual in nature. *Musinger v. Schweiker*, 709 F.2d 1212, 1215-16 (8th Cir. 1983).[2]

As will be explained below, the ALJ clearly erred in characterizing the claimant as an "employee" of GMA. The ALJ also erred in relying on Exhibit 9 in concluding that claimant earned nine quarters of coverage for pre-1951 employment. He described Exhibit 9 as a certified earnings record that included pre-1974 covered earnings. In fact, Exhibit 9 consists of partially completed "requests for scouting" forms which report earnings from 1974 through 1976. The Appeals Council properly reopened the ALJ's decision given these errors.

Claimant also argues that the ALJ's findings are supported by substantial evidence. However, judicial review of a final decision of the Secretary which is at odds in its factual findings with that of an ALJ focuses upon the Secretary's final decision rather than upon the ALJ's. *Kellough v. Heckler*, 785 F.2d 1147 (4th Cir. 1986). Courts in judicial review must uphold an Appeals Council decision if it is supported by substantial evidence. *Id.* at 1151. The ALJ's findings are not binding on the Appeals Council. *Lovejoy v. Heckler*, 790 F.2d 1114, 1116 (4th Cir. 1986). Since the Appeals Council properly re-

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[2] Of course, any reopening for legal error must be based on an incorrect interpretation of the law as construed *at the time of the administrative hearing*. *See* 20 C.F.R. § 404.989(b) (1985).

opened this case and did not exceed its authority, this court's review of the Council's decision is confined to ascertaining whether its factual findings are supported by substantial evidence. *See Lovejoy*, 790 F.2d at 1116, citing 42 U.S.C. § 405(g). *See also Kellough*, 785 F.2d at 1149 n. 2.

Federal courts review the Secretary's factual findings to establish that those findings are supported by substantial evidence. Yet the courts also must assure that the Secretary's ultimate conclusions are legally correct. *Myers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980). The entire record is examined to insure that the Secretary has applied correct legal standards. *Keeney v. Heckler*, 568 F. Supp. 1145, 1148 (D. Md. 1983). The Appeals Council decision in this case contained factual findings consistent to a great extent with the ALJ's. The Council incorporated most of the ALJ's evidentiary findings into its own decision. The Secretary's final decision differed from the ALJ's most notably in the legal conclusions drawn from these basically undisputed facts.[3]

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[3] There is some factual discrepancy as to whether *vel non* claimant's employment prior to 1951 entitles him to nine additional quarters of coverage for old-age insurance purposes. A review of the administrative decisions in this case and the hearing transcript reveals that this issue was not explicitly presented by claimant before either the ALJ or the Appeals Council. The ALJ framed the specific issue before him as whether the claimant's earnings record may be credited with wages or self-employment income for the years 1978, 1979 and 1980. There is no evidence indicating that the claimant contested the SSA's initial determination that he was not entitled to any quarters of coverage for employment prior to 1974. In fact, claimant did not press his claim for nine additional quarters of coverage relating to pre-1951 employment prior to filing a reply brief in this case. The court therefore is hesitant to address this particular issue, given claimant's failure to raise this specific claim in administrative proceedings. *See United States v. One 1971 Mercedes Benz*, 542 F.2d 912 (4th Cir. 1976).

Furthermore, the court need not address the merits of this issue at this time. Since the court affirms the Secretary's final decision for the reasons given hereafter, claimant at most possesses twenty-

All agree that the claimant served as exclusive manager of Greenmount Associates' apartment complexes pursuant to a partnership agreement executed in 1975. They also agree on the compensation claimant received for his managerial services. The question is whether that compensation is to be treated as "wages" or self-employment income. Because the Appeals Council interpreted federal tax law as precluding claimant from characterizing this compensation as "wages," this characterization is a legal conclusion. In contrast, the Secretary's determination that GMA's income from the apartment complex was "rental income" presents a mixed question of fact and law. The parties agree on the specific services claimant provided in his capacity as apartment manager. The characterization of income derived from these services as "rental income" is a legal conclusion. The court must apply different standards of review in resolving the "wages" and "rental income" issues.

B. *The Quarters of Coverage Question*

While the Appeals Council's findings are supported by substantial evidence in the record, it is less certain whether the Secretary applied pertinent legal standards in concluding that claimant's income fell within § 411 (a)(1)'s "rental income" exclusionary provision. However, because another legal theory exists which prevents claimant from receiving at least eight quarters of coverage, the Secretary's final decision must be affirmed.

1. *Wages v. Self-Employment Income*

Entitlement to quarters of coverage flows from "wages" earned in employment or from net earnings from self-

---

eight quarters of coverage, including the nine quarters of coverage for pre-1951 employment. Since this total falls short of the thirty-one quarters required to entitle claimant to old-age benefits, the inclusion of these additional quarters would still not entitle claimant to benefits at this time.

employment under the Act. It is undisputed that the claimant was a general partner in the GMA partnership for the years 1978 through 1980. Federal tax law provides that claimant could not be simultaneously classified as both an employee and a general partner of GMA. Bona fide members of a partnership are not employees of the partnership within the meaning of the Federal Insurance Contributions Act. IRS Revenue Ruling 69-184. A partner who devotes his time and energies to providing services to the partnership is a self-employed individual rather than an employee. *Id.* Any fixed salary received by a partner for his services rendered to the partnership is not "wages" with respect to employment but rather is a "guaranteed payment" which is includable in the recipient partner's gross income subject to self-employment tax. *Id.*; IRS Revenue Ruling 56-676. Therefore, the ALJ erred as a matter of law in characterizing claimant's income for the years 1978 through 1980 as "wages." [4]

2. *Claimant's Income As "Rental Income"*

Given that claimant's income for the three years in question is not "wages," claimant can qualify for quarters of coverage only if that income can be qualified as net earnings from self-employment (NESE) under the Act. The Act defines NESE as:

> "The gross income, as computed under Subtitle A of the Internal Revenue Code of 1954, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under such subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss . . . from any trade or business carried on by a partnership of which he

[4] The court notes that at least in one year, i.e., 1980, claimant characterized his fixed salary as guaranteed payments and included the same in a Schedule K-1 "Partner's Share of Income" form.

is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary income or loss—

(1) There shall be excluded rentals from real estate and from personal property leased with the real estate. . . ."

42 U.S.C. § 411(a). The Appeals Council found that any income which GMA derived from operation of its apartment complex was "rental income" excluded in determining claimant's NESE.

Only those services provided for the occupant's convenience may be included in computing one's net earnings from self-employment. 20 C.F.R. § 404.1082(d). Services provided solely in connection with the rental of rooms for occupancy are not included in the Act's definition of NESE. Hotel services and the use of space in parking lots, warehouse or storage garages are considered to be services provided to occupants. 20 C.F.R. § 404.1082 (d) (2) (i) (1985). SSA regulations further provide that "we do not consider the furnishing of heat and light, the cleaning of public entrances, exists, stairways and lobbies and the collection of trash, as services provided to the occupant." 20 C.F.R. § 404.1082(d) (2) (ii) (1985).

There is no dispute as to the particular services claimant performed in his capacity as apartment manager for GMA's several apartment complexes. The record reveals that claimant's responsibilities included providing leases, repairs, replacement and cleaning of rugs, instruction to tenants regarding proper cleaning of rugs, ground maintenance and maintenance of heating and air cooling systems. Claimant also received and answered service calls. Among the miscellaneous services provided by GMA through claimant was the servicing of plugged drains and other plumbing problems.

The Appeals Council characterized claimant as "the one who places all the orders for the materials, writes all

checks for invoices, payroll, etc." The Council concluded that GMA did not furnish services or supplies to its apartment tenants. Since GMA income was therefore "rental income," the Council continued, then *a fortiori* claimant's income also fell within that category excludable from self-employment income computation.

The claimant's income is not easily characterized. The characterization of his income as either rental or self-employment income depends upon the characterization of GMA's income for the years 1978 through 1980. Claimant's income characterization is inextricably intertwined with that of GMA because the former was a general partner in the latter. Claimant performed his services on behalf of GMA, and the nature of his income, received from the partnership, was no different from the nature of those payments received by GMA from its tenants; the existence of GMA as a partnership entity does not *per se* alter the characterization of income received from it and distributed to its recipient partners. *Cf. Ames v. Finch*, 297 F. Supp. 1147, 1149 (C.D. Ca. 1969) (Social Security regulations discriminating between NESE and rental income apply equally to partnership and individual owners of multi-housing units).

It is a close question whether GMA's income for the years 1978 through 1980 constitutes self-employment income or rental income. The tedious task of discerning between services rendered to occupants and services rendered solely to make space available for occupancy is further compounded by case law which is neither clear nor exhaustive in treating this particular subject matter. *Compare Hudson v. Celebrezze*, 220 F. Supp. 738, 740-41 (E.D.N.C. 1963) (customary services rendered solely to make space available for occupancy, as well as services performed in proper maintenance of premises are not considered services provided to occupant), *with Bunch v. Schweiker*, 681 F.2d 249, 251 (4th Cir. 1982) (implying that cleaning of premises, providing of laundry facilities

and maintaining of grass on premises may constitute services provided to occupants). Furthermore, there is a question as to whether the court must treat the entire sum of payments made to GMA as self-employment income if only a small fraction of those payments constituted compensation for services rendered to those tenants. *See Delno v. Celebrezze*, 347 F.2d 159, 163 & n. 10 (9th Cir. 1965). This court is not persuaded that the *Delno* court has treated this problem in a comprehensive manner.

However, the court need not resolve these complex issues. There exists a separate legal ground which mandates that the Secretary's denial of benefits be affirmed. Therefore, the court affirms the Appeals Council decision on a separate and distinct legal ground.

3. *Computation of Claimant's NESE for 1978-1980*

Assuming, *arguendo*, that claimant's income for the years 1978 through 1980 is "self-employment income," as that term is defined in the Act, the court must proceed to determine whether claimant's NESE was of a sufficient amount for these years to entitle him to quarters of coverage for that time period. A close view of the record in this case reveals that for at least 1979 and 1980 claimant's guaranteed payments were offset by his distributive share of losses incurred from partnerships of which he was a member. *See* 42 U.S.C. § 411(a). Accordingly, claimant at most is entitled to four quarters of coverage for the years 1978 through 1980. This number would provide claimant with at most twenty-eight quarters of coverage, still leaving him ineligible to receive social security old-age insurance benefits. Accordingly, the Secretary's decision must be affirmed on this separate legal ground.

As mentioned earlier, a claimant's NESE is defined under the Act as gross income less the distributive share of income or loss from any trade or business carried on

by a partnership of which the claimant is a member. Federal tax law sheds further light on this definition. Where a partner's distributive share includes a loss resulting from the operation of the partnership business, including the deduction for a guaranteed payment treated as a business expense, the partner's self-employment income is the net amount computed by applying to the guaranteed payment the distributive share of loss. *See* 26 I.R.C. § 707(c). *See also* Revenue Ruling 56-675.

This method of determining NESE precludes plaintiff from claiming quarters of coverage for the years 1979 through 1980. Plaintiff's tax returns reveal that he claimed his distributive share of losses from the RHAWC partnership as totaling $18,167.41 for 1979 and $18,721.29 for 1980. Since claimant's NESE consists of the aggregate of net income and losses, a loss sustained in one trade or business carried on by an individual will operate to offset the income derived by him from another trade or business. *See* 26 C.F.R. § 1.1402(a)-2(c). Accordingly, claimant's distributive losses from RHAWC for the years 1979 and 1980 offset the guaranteed payments he received from GMA for these years.[5] Since claimant's distributive losses from RHAWC exceed his claimed total income from GMA in 1979 and 1980, he could at best have an arguable claim for four quarters of coverage for 1978. Since the addition of these four quarters of coverage provide claimant with at most twenty-eight quarters of coverage,[6] the Secretary's decision denying him old-age insurance benefits must be affirmed.

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[5] As mentioned earlier, claimant listed guaranteed payments in the amounts of $14,080 and $16,640 for the years 1979 and 1980, respectively.

[6] Of course, crediting claimant with twenty-eight quarters of coverage assumes that he is entitled to the nine quarters deriving from pre-1951 employment. See *supra* n. 3.

C. *The Appropriateness of Mandamus Relief*

The court's rejection of claimant's arguments on appeal precludes the issuance of a writ of mandamus. The writ is considered an extraordinary remedy which courts will issue only if the plaintiff shows: (1) that a public official has a plain duty to perform certain acts; (2) that the plaintiff has a plain right to have those acts performed; and (3) that there exists no other adequate remedy by which the plaintiff's rights can be vindicated. *Cook v. Arentzen*, 582 F.2d 870, 876 (4th Cir. 1978). The court's ruling that claimant has failed to accumulate a sufficient number of quarters to qualify for insurance benefits precludes him from satisfying the three-prong test enumerated above.

Conclusion

For the foregoing reasons, claimant's motions for summary judgment and mandamus relief are hereby DENIED. The respondent's motion for summary judgment is GRANTED and the Secretary's final decision is AFFIRMED.

SO ORDERED this 29th day of July, 1986.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

APPENDIX C

CLAIM FILE

[Further Action
Necessary]

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

Name and Address of Claimant:

John Reddington
103 Oxford Dr.
Greenville, NC 27834

NOTICE OF FAVORABLE DECISION
PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. *If you are satisfied with the decision, there is no need for you to contact the hearing office or the Social Security office.* You will be notified as soon as action on the decision has been completed.

If you disagree with the decision, you have the right to request the Appeals Council to review it within *60* days from the date of *receipt* of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local Social Security office or at the hearing office, or you may write to these offices indicating your intent to request review. You may also mail the request for review directly to the Appeals Council, Office of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013

The Appeals Council may, on its own motion, within 60 days from the date shown below, review the decision,

which could possibly result in a change in the decision (20 CFR 404.969 and 416.1469). After the 60-day period, the Appeals Council generally may only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based (20 CFR 404.988 and 416.1488; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case (section 205(g), 1631(c)(3), or 1869(b) or the Social Security Act).

This notice and enclosed copy of
decision mailed

May 23, 1983

cc:

Name and Address of Representative:

Walter J. Early
Attorney at Law
119 S. Grace St.
Rocky Mount, NC 27801

CLAIM FILE

[Further Action
Necessary]

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

DECISION

IN THE CASE OF JOHN REDDINGTON
(CLAIMANT)

Claim for Old-Age Insurance Benefits

051-12-8976
(Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The issue before the Administrative Law Judge is whether the claimant is entitled to old-age insurance benefits which depends, in part, on whether he has the prerequisite quarters of coverage to be fully insured for such benefits. Specifically at issue is whether the claimant's earnings record may be credited with wages or self employment income for the years 1978, 1979 and 1980.

STATEMENT OF LAW AND REGULATIONS

Section 202(a) of the Social Security Act provides, as pertinent here, for the payment of old-age insurance benefits to an individual who is a fully insured individual (as defined in section 214(a)), has attained age 62, and has filed application for such benefits.

Section 214(a) of the Act, as pertinent here, defines the term "fully insured individual" as any person who has not less than one quarter of coverage for each calendar year elapsing after 1950 and before the year in which he or she attained age 62.

Section 213(a) of the Act provides, as pertinent here, that the term "quarter of coverage" means, for calendar years before 1978, a calendar quarter in which an individual has been paid $50 or more in wages or has been credited with $100 or more in self-employment income.

Section 213(a) of the Act further provides, as pertinent here, that the term "quarter of coverage" means, for calendar years after 1977, each portion of the total of the wages paid and the self-employment income credited to an individual in a calendar year which equals the amount required for a quarter of coverage in that calendar year (as determined under subsection (d)). Subsection (d) provides that for the years 1978, 1979 and 1980, these amounts are $250, $260 and $290, respectively.

Section 209 of the Act provides, as pertinent here, that the term "wages" means remuneration for employment.

Section 211(b) of the Act, as pertinent here, provides that the term "self-employment income" means the net earnings from self-employment derived by an individual during any taxable year beginning after 1950, except that such term shall not include the net earnings from self-employment if such net earnings for the taxable year are less than $400.

Section 211(a) of the Social Security Act, as pertinent here, defines the term "net earnings from self-employment" as the gross income, as computed under subtitle A of the Internal Revenue Code of 1954, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under that subtitle which are attributable to such trade or business.

EVALUATION OF THE EVIDENCE

Mr. Reddington applied for retirement insurance benefits on December 16, 1981, in anticipation of retirement upon reaching age 62 in March 1982. His claim for benefits was denied initially and on reconsideration because he lacked sufficient quarters of coverage to be "fully insured" under the Social Security Act. This was based on a determination that his income for the years 1978, 1979 and 1980 was net earnings from the rentals of real estate and could not be the basis for the award of quarters of coverage for those years. Prior to the elimination of the quarters of coverage awarded for 1978, 1979 and 1980, Mr. Reddington's certified earnings record (Exhibit 9), showed that he had at least 36 quarters of coverage, counting quarters of coverage he earned before 1951 and the twelve quarters of coverage at issue in this case for the years 1978, 1979 and 1980. Not included were any quarters of coverage he possibly earned after 1980. Mr. Reddington requires 31 quarters of coverage to be fully insured. Thereafter, he made a timely request for a hearing.

A hearing was held in Greenville, North Carolina, on February 25, 1983. Mr. Reddington was represented by Walter Early, an attorney at law. Mr. Reddington testified at the hearing as did Ms. Josephine Dees, Mr. Reddington's accountant, Mr. E. C. Powell, Mr. Reddington's partner, and Mr. Don Rudd, a manager of an apartment unit owned by Mr. Reddington and Mr. Powell.

The testimony at the hearing and the documentary evidence of record show that Mr. Reddington entered into a partnership with C. H .Powell, E. C. Powell, and V. W. Thomas in September 1974, to purchase and operate apartment buildings. Thomas Realty Company was to be paid to manage the apartments. The partnership agreement contained extensive provisions relating to the duties and manner of payment for management provided by Thomas Realty. This relationship terminated based

on a notice given in September 1975, and was replaced by a partnership agreement entered into on October 15, 1975 by the Powells and Mr. Reddington. Mr. Reddington was to become the manager of the properties owned by the partnership which were to be called Greenmount Associates (hereinafter GMA). The partnership agreement provided that Mr. Reddington would be paid $1,000 per month in addition to his distributive share as a partner. The section of the partnership agreement dealing with Mr. Reddington's management capacity indicated that his position as a manager could be terminated on 60 days notice from either Mr. Reddington or the Powells to the other party (Exhibit 30). This partnership relationship continues to the present time.

Mr. Reddington served as manager of GMA's properties after October 1975. He also manages two other partnerships, which he entered with C. H. Powell. These are Rose Hill Associates (hereinafter RHA) and Rose Hill Associates Water Company (hereinafter RHAWC), a trailer park and water utility company, respectively. The ownership shares in GMA are 37½ percent, 37½ percent, and 25 percent for C. H. Powell, E. C. Powell, and Mr. Reddington, respectively. Only Mr. Reddington was identified in the partnership agreement to perform specific duties and to receive money other than distribution according to partnership shares. The Powells were to share only in the profit and loss of the partnerships. In RHA and RHAWC, C. H. Powell and Mr. Reddington share equally (Exhibits 13 through 16, 18 and 30).

Mr. Reddington and the other witnesses testified at the hearing and the documentary evidence establishes Mr. Reddington's extensive work activity on behalf of the GMA partnership. With respect to the trailer park, RHA, a different manager has been appointed. In addition, Mr. Reddington and the Powells are available to make major decisions but the day to day decisions are made by the manager (Exhibit 18). The oversight func-

tions with respect to RHAWC are provided for by a subcontractor (Exhibit 26).

In a letter dated January 15, 1983, Mr. Reddington described his duties with GMA as similar to those that would be performed by a chief of operations. These duties include bookkeeping, collections, reviewing paperwork, issuing checks, banking, preparing weekly and monthly reports for the other partners, personnel matters, including all hiring and firing, and oversight of the maintenance of the apartments (Exhibit 29). This description of his activities is supported by a letter dated June 10, 1982, from his accountant, Ms. Josephine Dees (Exhibit 25). Documents of record indicate that in the past Mr. Reddington has engaged in major financial affairs on behalf of GMA (Exhibit 20).

For his work, Mr. Reddington originally received $1,000 per month according to the partnership contract (Exhibit 30). This was increased over time to $1,280 per month in 1982, and was increased to $2,560 per month for January, February and March 1982 (Exhibit 23). At that point he intended to stop receiving his salary (Exhibit 13). In his personal United States tax returns for 1978, 1979 and 1980, he reported gross receipts from this work activity from GMA for $15,360, $14,080, and $16,340, respectively. These were deducted by GMA as a guaranteed payment to a partner for 1980, and were not specifically identified in its return for the other years (Exhibit 19).

The critical factor in resolution of this claim is the characterization of the money received by Mr. Reddington from GMA. Unfortunately, this money has been cast as a horse of at least four different colors, with Mr. Reddington advocating different hues at different times. At the lower levels of appeal, the Social Security Administration denied Mr. Reddington's claim based on their conclusion that the money he derived from GMA, RHA, and RHAWC, constituted rentals from real estate and

self-employment income, with no resultant net income (Exhibit 22). On his Schedule C of his United States tax returns for these years, Mr. Reddington identified himself as an "apartment manager" (Exhibits 18 and 19). In his letter of January 15, 1983, Mr. Reddington referred to this income as wages and salary, distinct from his distributive share of the partnership income. He regarded this as reimbursement for his activities as chief of operations (Exhibit 29). At the hearing, Mr. Reddington identified himself as a private contractor. Mr. Reddington's attorney submitted a brief on April 15, 1983, contending that Mr. Reddington has been an independent contractor. In Exhibit 31, a statement submitted by Mr. Reddington at the hearing, he characterized his management fees as salary. The Powell brothers, in a statement signed on February 24, 1983, also indicated their opinion that Mr. Reddington has been an independent contractor (Exhibit 30).

Before addressing each characterization individually, the Administrative Law Judge must first note that Mr. Reddington's relationships to these partnerships has not consistently or clearly been only one legal entity. The Administrative Law Judge can only conclude as to what the relationship has not been and what it primarily has been. With respect to his relationship to RHA and RHAWC, the partnership agreement between C. H. Powell and Mr. Reddington does not contain a management arrangement as is contained in the partnership agreement for GMA. In fact, the partnership agreement for RHA and RHAWC assign the management of those business to Hazel H. Powell and Eunice H. Reddington (Exhibit 18). In addition, as testified to at the hearing and reflected in statements of record, Mr. Reddington has had very few duties relating to the operation of these partnerships.

With respect to the amounts at issue, in his 1980 United States tax return, Mr. Reddington reported

$16,640 included as a guaranteed payment to a partner. This amount is reflected in the Schedule K-1 of the 1980 return filed by GMA. In 1980, neither RHA nor RHAWC made any guaranteed payments to partners. RHA did distribute income to partners as reflected by its report on Schedule K-1 and Mr. Reddington's Schedule E for 1980. RHAWC showed a net loss.

In 1979, RHA reported a net loss. GMA reported no guaranteed payments to partners and reported an overall loss. Mr. Reddington's individual United States tax return for 1979 showed $14,080 of gross income as an apartment manager reported in Schedule C. He also shared in the net losses of all three partnerships which is consistent with the reports of the Schedules K-1 for each of the three partnerships.

For 1978, Mr. Reddington reported gross income on his Schedule C of $15,360 and Schedule E losses for all three partnerships. The Administrative Law Judge notes that GMA reported its payments to Mr. Reddington inconsistently over the three years. Apart from this, several other points are clear. RHAWC has shown no net income and therefore need not be considered further. RHA has made one distribution in three years. Based on the absence of any significant duties more than would be expected of a partner and the absence of any contractural arrangement for Mr. Reddington to perform specific duties for RHA, the Administrative Law Judge concludes that the one distribution Mr. Reddington received from RHA was a return on investment. Therefore, it is not "income" as defined in the Social Security Act which would generate a quarter of coverage. Thus, all that remains to be examined are the payments made to Mr. Reddington by GMA.

GMA generates money by renting apartments. Mr. Reddington is not a real estate broker, but he is in a business which is something other than merely receiving a return on investment. The description of his activities

does conform to his characterization as a chief of operations or a general manager. He does perform extensive activities and provides extensive services to the occupants of the apartments owned by GMA. Thus, the money has received from GMA is not just a return from real estate investment within the meaning of Section 404.1083 of Social Security Regulations No. 4.

Turning now to the contentions made by Mr. Reddington that he has been an independent contractor, the Administrative Law Judge notes that there are certain general principles of law used to distinguish independent contractors from employees. The general distinguishing factor is that a principal has no right to control the manner and method in which an independent contractor performs a job other than what is established by their contract. In addition, there are certain characteristics generally possessed by independent contractors. An independent contractor usually has a distinct business and frequently engages in contractual relationships with several other contractors. An independent contractor generally provides his or her own tools and facilities. An independent contractor is usually employed for a specific period of time. An independent contractor usually is paid on a contractual or "per job" basis rather than on the basis of a time period.

Mr. Reddington's management predecessor, Thomas Realty Company, quite possibly was an independent contractor with GMA. This factor is not determinative. The Administrative Law Judge notes that the contract between GMA and the Thomas Realty Company was quite extensive in detailing the relationship. The agreement between Mr. Reddington and his partners regarding Mr. Reddington's management duties was quite brief and nonspecific. The evidence shows that Mr. Reddington was not engaged in apartment management for any company other than GMA. He did not pay other employees, such as the unit manager, Mr. Don Rudd, who testified

at the hearing. Their salaries are paid by GMA. Mr. Reddington's US tax returns do not reflect deductions for other types of expenses ordinarily incurred by employers such as advertising, rent, repairs, telephone, or insurance. Instead, his Schedule C's for the three years at issue here reflect unreimbursed employee types of expenses, such as mileage, dues, and legal fees. Although there was some discussion of a basis of payment for Mr. Reddington based on the number of apartment units he had rented, he has always referred to his income as paid on a monthly basis. Mr. Reddington does not have his own place of employment, but rather, works out of an apartment provided by GMA. There is no extensive contract between Mr. Reddington and GMA governing the basis for his compensation, the time of his employment, or the duties expected of him as would be expected with an independent contractor and, as was entered into with the Thomas Realty Company. Thus, the Administrative Law Judge concludes that Mr. Reddington was not an independent contractor to GMA. Finally, the Administrative Law Judge notes that there is no particular advantage to Mr. Reddington to advocate such a conclusion since the proceeds from an independent contractor relationship would be subject to offsetting expenses and losses. Thus, Mr. Reddington would have no net income and no quarters of coverage.

The Administrative Law Judge concludes that Mr. Reddington was, in effect, an employee of the partnership with respect to his duties as a manager. He does not believe that a partner can never be an employee of a partnership. In this situation, Mr. Reddington performed duties which were not performed by the other partners, for which he received specific compensation as set out in the partnership agreement. Mr. Reddington has been somewhat inconsistent in his own characterization of the relationship but at times he has characterized his income as wages and salary. GMA has been somewhat incon-

sistent with respect to how it reports its payments to Mr. Reddington for tax purposes but, the accountant, Ms. Dees, stated that the payments to Mr. Reddington were made along with the other expenses of GMA, separate from and prior to any distribution to the partners. The factors indicating that Mr. Reddington was not an independent contractor tend to indicate that he was an employee. The fact that GMA paid Mr. Reddington as it paid its other employees, the fact that Mr. Reddington was provided an apartment to use as an office, and the fact that Mr. Reddington deducted only his personal expenses for tax purposes, all tend to support this conclusion. In addition, Mr. Reddington acknowledged that he prepares weekly and monthly reports to the other partners (Exhibit 25).

The ultimate test of whether a business relationship is one of employee and employer is that of control. Mr. E. C. Powell testified at the hearing that he had never given Mr. Reddington an order. The real issue is whether Mr. Powell could control Mr. Reddington's activities as a manager if he chose to do so. The partnership agreement for GMA gives the Powells authority to discharge Mr. Reddington from his manager role on 60 days notice with no other requirements despite the fact that Mr. Reddington is a partner. This fact of the ultimate control, in combination with the other factors identified above, support the Administrative Law Judge's conclusion that Mr. Reddington was an employee of GMA. The complexity and vagueness of the role Mr. Reddington played with the partnership do not result in an overwhelmingly clear picture of the relationship but the factors above establish that the relationship of an employee to an employer is more likely and more logical than the other possibilities. Thus, Mr. Reddington's income for the years 1978, 1979, and 1980, was wages and was more than sufficient to give him quarters of coverage to meet the "fully insured" requirement.

In his brief, the claimant's attorney argued that the Social Security Administration was inconsistent in seeking to change Mr. Reddington's earnings record for 1978, 1979 and 1980, because the claimant had been engaged in the same type of work activity for several years prior to 1978. The Administrative Law Judge notes that this fact is not probative in view of the time limitation on correcting earnings records set out in Subpart I of Social Security Regulations No. 4.

FINDINGS

After careful consideration of the evidence of record, the Administrative Law Judge makes the following findings:

1. The claimant filed an application for old-age insurance benefits on December 16, 1981.
2. The claimant requires 31 quarters of coverage for fully insured status.
3. The claimant's earnings record may be credited with $15,360, $14,080 and $16,640 in wages for the years 1978, 1979 and 1980, respectively, and for 12 additional quarters of coverage.
4. The claimant has a total of at least 36 quarters of coverage and is, therefore, a fully insured individual.

DECISION

It is the decision of the Administrative Law Judge that the claimant is fully insured and therefore is entitled to old-age insurance benefits on the basis of his application filed on December 16, 1981.

/s/ H. Clayton Adams
H. CLAYTON ADAMS
Administrative Law Judge

May 23, 1983
Date

RJ/ah

APPENDIX D

[SEAL]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to:

SGC
051-12-8976

Social Security Administrator
Office of Hearings and Appeal
PO Box 2518
Washington DC 20013

January 24, 1984

Mr. John P. Reddington
103 Oxford Drive
Greenville, North Carolina 27834

Dear Mr. Reddington:

Enclosed is a copy of the decision of the Appeals Council on your claim under the Social Security Act.

If you disagree with the enclosed decision and desire a review by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside within 60 days from the date of receipt of this letter. It will be presumed that you received this letter within five (5) days after the date shown above unless a reasonable showing is made otherwise. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended (42 U.S.C. 405 (g)). Where claim is for supplemental security income see also section 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 1383(c)(3)), and where claim is for medicare see also section 1869(b) of the Social Security Act, as amended (42 U.S.C. 1395 ff.(b)). If a civil action is commenced, the Bill of Complaint should name the Secretary of Health and Human Services as the defendant

and should include the social security number(s) shown at the top of this letter.

If you have any questions, your Social Security office will be glad to help you.

Sincerely yours,

/s/ Richard F. Brodsky
RICHARD F. BRODSKY
Member, Appeals Council

Enclosure

cc: Walter J. Early, Esq.
NEPSC, Attn: Reconsideration Branch, P.O. Box P, Corona-Elmhurst Station, Elmhurst, N.Y. 11373
DO: Greenville, N.C.
HO: Raleigh, N.C. (ALJ Adams)
RCALJ: Atlanta, Ga.

RFB:rt

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

DECISION OF APPEALS COUNCIL

IN THE CASE OF JOHN P. REDDINGTON
(CLAIMANT)

Claim for Old-Age Insurance Benefits

051-12-8976
(Social Security Number)

This case is before the Appeals Council, under the authority of sections 404.988(b) and 404.989(a)(3) of Social Security Administration Regulations No. 4, to reopen and revise the hearing decision issued on May 23, 1983, on the basis that said hearing decision contains an error on the face of the evidence on which it was based. The Appeals Council notified the claimant of this action and of his rights with respect thereto on December 9, 1983. No response to that notice has been received.

In his decision, the administrative law judge concluded that the claimant was fully insured and entitled to old-age insurance benefits based on the application he filed on December 16, 1981. In finding that the claimant was fully insured for old-age insurance benefits, the administrative law judge held that he required 31 quarters of coverage for fully insured status and that the Secretary's record of his earnings may be credited with wages of $15,360 for 1978, wages of $14,080 for 1979, and wages of $16,640 for 1980. On the basis of 12 additional quarters of coverage credited for those years, he found that the claimant had a total of 36 quarters of coverage.

The administrative law judge's statement with regard to the pertinent provisions of the Social Security Act and

the evidentiary facts are incorporated herein by reference and supplemented as applicable.

The Appeals Council has considered the record that was before the administrative law judge and the following additional material entered into the record of this case.

Exhibit AC-1

> Memorandum of June 20, 1983 from the Northeastern Program Service Center to the Office of Hearings and Appeals

Exhibit AC-2

> Copy of Appeals Council's reopening letter of December 9, 1983 to the claimant

ISSUES

The general issue before the Appeals Council is whether the claimant is "fully insured" for purposes of entitlement to old-age insurance benefits. The specific issue is whether the Secretary's record of the claimant's earnings may be revised to include wages for 1978 through 1980.

APPLICABLE LAW

Section 211(a) of the Social Security Act provides, in pertinent part, that the term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions which are attributable to such trade or business, except that there shall be excluded the income from rentals from real estate unless such rentals are received in the course of a trade or business as a real estate dealer.

Section 212(a) of the Social Security Act provides that self-employment income is divided and allocated equally to each quarter of a calendar year for crediting purposes.

Section 213 of the Act provides that a quarter of coverage is creditable for each increment of earnings of $250 for 1978, $260 for 1979 and $290 for 1980.

Section 214(a) of the Act provides that the term "fully insured individual" means an individual who has not less than one quarter of coverage (whenever acquired) for each calendar year elapsing after 1950 and before the year in which he attains age 62.

EVIDENCE CONSIDERED

The Appeals Council has carefully considered all the evidence of record.

EVALUATION OF THE EVIDENCE

On December 16, 1981, the claimant filed an application for old-age insurance benefits. Based on his birthdate of March 14, 1920, he requires 31 quarters of coverage to be fully insured. The Administration's breakdown of the earnings reported to his Social Security number indicated that the claimant had 40 quarters of coverage, which included military service wage credits from 1940 through 1950 and regular wage credits beginning with the March 1974 calendar quarter and ending with the December 1980 calendar quarter. The claim was denied initially and thereafter on reconsideration by the Social Security Administration on the grounds that the claimant lacked sufficient quarters of coverage to be fully insured under the Social Security Act. This was based on a "Special Determination" that the claimant's income for the years 1978, 1979 and 1980 was actually rentals from real estate and was excluded as self-employment income under section 211(a)(1) of the Social Security Act. It was also reasoned that the claimant could not be an employee of the firm that owned the apartments he managed because he was a partner in that firm. In addition, the military service prior to 1951 was determined not creditable for Social Security purposes as the claimant was receiving a benefit from another Federal agency on the basis of

that service. This resulted in the claimant having only 15 of the required 31 quarters of coverage to be fully insured.

As indicated above, the administrative law judge found that the Secretary's record of the claimant's earnings may be credited with wages of $15,360 for 1978, $14,080 for 1979 and $16,640 for 1980 because he was an employee of the partnership of Greenmount Associates and, thus, his income for the years 1978, 1979 and 1980 constituted wages. Accordingly, the administrative law judge concluded that the claimant was fully insured with 36 quarters of coverage and is entitled to old-age insurance benefits on the basis of his application filed therefor on December 6, 1981.

The Appeals Council notes that the crediting of 12 quarters of coverage for 1978 through 1980 would result in the claimant having only 27 of the 31 quarters of coverage he needs to be fully insured.

The record establishes that the claimant was a co-partner in 3 partnerships (1) a mobile home trailer park doing business under the name of Rose Hill Associates, (2) a partnership formed for purposes of supplying water to residents of a trailer park and (3) another was formed in 1974 for a complex of apartment buildings doing business under the name of Greenmount Associates, in which 325 apartments were rented and where no services or supplies were furnished to tenants. Tax returns showed Rose Hill Associates reported a loss for each of the years 1978, 1979 and 1980; Rose Hill Associates Water Company operated at a loss for the two fiscal years 1979 and 1980 and Greenmount Associates operated at a loss of $12,328.26 for fiscal year from September 1, 1978 through August 31, 1979, at a loss of $23,730.43 for the fiscal year from September 1, 1979 through August 31, 1980 and at a loss of $94,614.23 for the fiscal year from September 1, 1980 through August 31, 1981.

The partnership of Greenmount Associates, formed in 1974, has as its gross income rentals from real estate. Rentals were not received in the course of a trade or business as a real estate dealer. No services or supplies were furnished to the tenants. From the rentals from real estate, the partnership reported (on Forms 1065 United States partnership returns of income) payments to the claimant as management fees of $15,360 during the fiscal year beginning September 1, 1978 and ending August 31, 1979, payment of $14,080 during the fiscal year beginning September 1, 1979 and ending August 31, 1980 and payment as management fees of $16,640 during the fiscal year beginning September 1, 1980 and ending August 31, 1981.

In this case, the claimant has been recognized, in effect, as the manager or supervisor of Greenmount Associates, the one who places all the orders for the materials, writes all checks for invoices, payroll, etc. The claimant's accountant has indicated that he is on a guaranteed salary basis with the organization, spending over 95% of his time in the offices of Greenville and Washington, North Carolina.

The Appeals Council notes that, although a partnership may provide that one or more of the partners will receive payments for a salary, payments for use of capital or interest on capital contributions, irrespective of whether the partnership has ordinary net income or loss and that such payments are called guaranteed payments. Guaranteed payments are merely a method of distributing partnership earnings and represents earnings from self-employment when added to a recipient's distributive share of the partnership's ordinary income or loss, only if the partnership is engaged in a trade or business.

The guaranteed salary of a partner is allowed as a business deduction in computing partnership income. However, the receiving partner is not considered an employee of the partnership and his guaranteed salary payments are not "wages."

On the basis of the foregoing, bona fide members of a partnership are not employees of the partnership within the meaning of the Federal Insurance Contributions Act. A partner is considered self-employed under section 211 (a) of the Social Security Act if the partnership of which he is a member was engaged in a trade or business. In the claimant's case, the only income derived by the partnership was rentals from real estate, which are excluded from self-employment earnings under section 211 (a) (1), even though his distributive share of those rentals may have been greater because of his services. Accordingly, the Secretary's record of the claimant's earnings may not be revised to include wages for 1978 through 1980 as he had no earnings covered under the Social Security Act during those years. Through 1980, the claimant has acquired only 15 of the 31 quarters of coverage he needs to be fully insured and is not entitled to old-age insurance benefits as found by the administrative law judge.

FINDINGS

The Appeals Council makes the following findings in this case:

1. The claimant derived no creditable wages or self-employment income under the Social Security Act for 1978 through 1980.
2. The claimant has acquired only 15 quarters of coverage through 1980, whereas he needs 31 quarters of coverage to be fully insured.
3. The claimant does not meet the fully insured status requirements of the Social Security Act for purposes of entitlement to old-age insurance benefits.

DECISION OF THE APPEALS COUNCIL

It is the decision of the Appeals Council that the claimant is not entitled to old-age insurance benefits on the basis of

his application filed therefor on December 16, 1981. The decision of the administrative law judge is reversed.

APPEALS COUNCIL

/s/ Richard F. Brodsky
RICHARD F. BRODSKY
Member

/s/ Adelaide Edelson
ADELAIDE EDELSON
Member

DATE: January 24, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3625

JOHN P. REDDINGTON,
Appellant,

versus

OTIS R. BOWEN,
Appellee.

[Filed Aug. 26, 1987]

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins for a panel consisting of Judge Hall, Judge Wilkins and Judge Hoffman, District Judge, sitting by designation.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Case Number: 84-104-CIV-4

NEW BERN DIVISION

JOHN P. REDDINGTON

v.

OTIS R. BOWEN, Secretary,
Health and Human Services,

[Filed Aug. 4, 1986]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED claimant's motions for summary judgment and mandamus relief are hereby DENIED. The respondent's motion for summary judgment is GRANTED and the Secretary's final decision is AFFIRMED.

THE ABOVE JUDGMENT WAS ENTERED ON THIS DAY, AUGUST 1, 1986 AND COPIES MAILED TO THE FOLLOWING:

Mr. Jack B. Crawley, Jr.
SPRUILL, LANE, CARLTON, McCOTTER & JOLLY
Post Office Drawer 353
Rocky Mount, North Carolina 27801

Mr. Walter J. Early
EARLY & CHANDLER
119 South Grace Street
Rocky Mount, North Carolina 27801

Mr. Samuel T. Currin
United States Attorney
Eastern District of North Carolina
P.O. Box 26897
Raleigh, North Carolina 27611

J. RICH LEONARD
Clerk

/s/ Gerald T. Atkins
(By) Deputy Clerk

Date August 4, 1986

APPENDIX G

EXHIBIT AC-2

[SEAL]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
Office of Hearings and Appeals
P.O. Box 2518
Washington, D.C. 20013

Dec. 9, 1983

Mr. John P. Reddington
103 Oxford Drive
Greenville, NC 27834

Dear Mr. Reddington:

The Appeals Council, under the authority of sections 404.988(b) and 404.989(a)(3) of Social Security Administration Regulations No. 4 (70 CFR 404.988(b) and 404.989(a)(3)), reopens the hearing decision of May 23, 1983 because it contains an error on the face of the evidence on which it was based. In taking this action, the Appeals Council considered the enclosed memorandum of June 20, 1983 from the Northeastern Program Service Center.

In his decision, the administrative law judge concluded that you are fully insured and entitled to old-age insurance benefits based on the application you filed on December 16, 1981. In finding that you were fully insured for old-age insurance benefits, the administrative law judge held that you required 31 quarters of coverage for fully insured status and that the Secretary's record of your earnings may be credited with $15,360, $14,080 and $16,640 in wages for the years 1978, 1979 and 1980,

respectively. With these 12 additional quarters of coverage, he found that you had a total of 36 quarters of coverage.

The Appeals Council notes that the addition of 12 quarters of coverage for 1978 through 1980 would result in your having only 27 of the 31 quarters of coverage you need to be fully insured. In any event, bona fide members of a partnership are not employees of the partnership within the meaning of the Federal Insurance Contributions Act. A partner is considered self-employed under section 211(a) of the Social Security Act if the partnership of which he is a member was engaged in a trade or business. In your case, the only income derived by the partnership was rentals from real estate, which are excluded from self-employment earnings under section 211(a)(1), even though your distributive share of these rentals may have been greater because of your services. Therefore, the Appeals Council, in the absence of evidence to the contrary or pertinent legal argument, is prepared to issue a decision finding that the Secretary's record of your earnings may not be revised to include wages for 1978 through 1980 as you had no earnings covered under the Social Security Act during those years. Accordingly, through 1980, you will have acquired only 15 of the 31 quarters of coverage you need to be fully insured and you would not be entitled to old-age insurance benefits.

You or your representative may submit additional evidence or a further written statement as to the facts and law in your case. Either or both should be submitted by mail to the Appeals Council within 20 days from the date of this letter, or the Council should be informed within that time when the material may be expected.

You or your representative may request an appearance before the Appeals Council to present oral argument. A request will be granted where the Council determines that a significant question of law or policy is presented or

where the Council is of the opinion that such oral argument would be beneficial in rendering a proper decision in your case. Any request for an appearance should be submitted in writing within 20 days from the date of this letter and should include the reasons for the request. If such a request is submitted, and the Council decides to grant it, you will be notified of the time and place of such appearance.

If you do not want to request an appearance before the Appeals Council and do not want to submit anything additional, you need not write to the Council. The decision of the Council will be based upon the evidence of record and the provisions of law which must be applied in your case.

Sincerly yours,

/s/ Richard F. Brodsky
RICHARD F. BRODSKY
Member, Appeals Council

/s/ Adalaide Edelson
Member, Appeals Council

Enclosures:

Conv of memorandum dated June 20, 1983 from
the Northeastern Program Service Center
Self-addressed envelope

cc:

Walter J. Early, Esq.
119 S. Graca Street
Rocky Mount, NC 27801

HO, Raleigh, NC (ALJ Adams)

APPENDIX H

EXHIBIT AC-1

DEPARTMENT OF HEALTH & HUMAN SERVICES

[SEAL] 424
Memorandum

Refer to: SPRF #23312

Date: June 20, 1983

From: Office of the Director of Operations
Northeastern Program Service Center
Reconsideration Branch

Subject: 051-12-8976 - W/E - John R. Reddington
A - John R. Reddington

To: Department of Health and Human Services,
Social Security Administration,
Office of Hearings and Appeals,
Ballston Center Tower 2,
800 North Randolph Street,
Arlington, Virginia 22203

This case is being referred to you per GN 03103.515 B for review of the decision of the administrative law judge of May 23, 1983, because the decision is clearly contrary to the act and regulations.

In his decision, the administrative law judge determined that John R. Reddington was paid wages as an employee of the partnership of GMA of $15,360 in the calendar year 1978, wages of $14,080 in the calendar year 1979 and wages of $16,640 during the calendar year 1980. In making this determination the administrative law judge determined that amounts paid during the fiscal years beginning September 1 of each year and ending on August 31 of the following year constituted wages during each

calendar year beginning on January 1 and ending on December 31, contrary to the act and regulations.

Section 404.1042 of Regulations Number 4 provides that wages are received by an employee at the time they are paid by the employer to the employee. Therefore, wages paid during a calendar year cannot be determined based on the amounts reported as paid during a fiscal year.

Moreover we are unable to find any authority for the proposition that a partner may be an employee of the partnership of which he is a partner. To the contrary, Revenue Ruling 69-184 holds that bona fide members of a partnership are not employees of the partnership within the meaning of the Federal Insurance Contributions Act. A partner who devotes time and energy in the conduct of the trade or business or in providing services to the partnership as an independent contractor is in either event a self-employed individual rather than an employee. This ruling further holds that such remuneration is not wages. Therefore, pursuant to this ruling a partner in a business in which he is a partner, and remuneration received by the partner cannot constitute wages.

In view of the above, we are referring the case to you for whatever action you deem necessary.

/s/ Myrna Reich
MYRNA REICH

Attachment:

Claims Folder 051-12-8976

Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 87-875

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN P. REDDINGTON, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Appeals Council properly reopened the Administrative Law Judge's decision finding petitioner eligible for old-age insurance benefits under the Social Security Act, based on its finding of a clear error in the ALJ's decision.

2. Whether the Appeals Council correctly determined that petitioner had not accrued sufficient quarters of covered employment to be eligible for old-age insurance benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-875

JOHN P. REDDINGTON, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 825 F.2d 408 (Table). The order of the district court (Pet. App. 4a-16a) is reported at 640 F. Supp. 1005.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1987, and a petition for rehearing was denied on August 26, 1987 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on November 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In order to be eligible for old-age insurance benefits under the Social Security Act, an individual must have a sufficient number of quarters of covered employ-

ment to be "fully insured." 42 U.S.C. 402(a). Petitioner's application was denied by the Social Security Administration (SSA) at the initial determination and reconsideration stages on the ground that he did not have 31 quarters of coverage, as required by 42 U.S.C. 411(a)(1). Pet. App. 5a, 21a.

Petitioner then sought a hearing before an Administrative Law Judge (ALJ) in SSA's Office of Hearings and Appeals. The ALJ held that petitioner had 36 quarters of coverage and therefore was entitled to benefits (Pet. App. 19a-29a). Critical to this determination was the ALJ's inclusion of 12 quarters for the years 1978, 1979 and 1980 (*id.* at 28a-29a). During those years, petitioner received payments from a partnership, Greenmount Associates (GMA), of which he was a general partner (*id.* at 6a, 22a, 25a-26a). GMA owned and operated apartment complexes, and the partnership agreement provided for guaranteed payments to petitioner in return for management services (*id.* at 6a, 14a-15a). At the initial determination and reconsideration stages, SSA had concluded that this income was either rental income, which is excluded from coverage (see 42 U.S.C. 411(a)(1)), or self-employment income that, because of offsetting losses, yielded no *net* income giving rise to covered quarters (Pet. App. 23a-24a). The ALJ agreed that if petitioner was a self-employed "independent contractor" during this period, as petitioner contended (*id.* at 26a), he would have no net income (and thus no quarters of coverage) for that period, because of offsetting expenses and losses (*id.* at 27a). However, the ALJ concluded that petitioner was an employee of GMA from 1978 through 1980; that his income should be regarded as "wages" (with no offset for expenses and losses); and that he therefore was entitled to 12 quarters for those years (*id.* at 27a-29a).

b. The ALJ's decision was rendered on May 23, 1983 (Pet. App. 29a). A covering notice informed petitioner that the Appeals Council could, on its own motion, grant review of the ALJ's favorable decision within 60 days (*id.* at 17a-18a, citing 20 C.F.R. 404.969) and that the Appeals Council could reopen and revise the ALJ's decision even after 60 days if new and material evidence was discovered, if a clerical error had been made, or if "there is an error as to the decision on the face of the evidence on which it is based" (Pet. App. 18a, citing 20 C.F.R. 404.988).

The Appeals Council did not choose to *review* the ALJ's decision on its own motion within 60 days. But the Appeals Council subsequently did decide to *reopen* the ALJ's decision, because an error was brought to the Appeals Council's attention by the Northeastern Program Service Center, the component of SSA responsible for completing the paperwork necessary to determine the amount, if any, of benefits that would be payable pursuant to the ALJ's decision. By memorandum dated June 20, 1983, the Service Center referred the case back to the Office of Hearings and Appeals because, in its view, the ALJ's decision was "clearly contrary to the act and regulations" (Pet. App. 46a). The memorandum explained that under IRS Rev. Rul. 69-184, 1969-1 C.B. 256, which construed the provisions of the Federal Insurance Contributions Act (FICA), 26 U.S.C. (& Supp. III) 3101 *et seq.* that address the subject of payments made to a partner, members of a partnership are not to be treated as employees of the partnership, and income received by a partner who performs services for the partnership therefore cannot be treated as wages but instead must be treated as either income from a trade or business or self-employment income (Pet. App. 47a).

By letter dated December 9, 1983, the Appeals Council notified petitioner that, after considering the June 20, 1983, memorandum from the Service Center, it was

reopening the ALJ's decision because it was erroneous on its face (Pet. App. 43a-45a).[1] After affording petitioner an opportunity to submit additional evidence or legal arguments on the coverage question (*id.* at 44a), the Appeals Council rendered a new decision on January 24, 1984 (*id.* at 32a-38a). The Appeals Council concluded that petitioner did not have the requisite number of covered quarters because: (i) under FICA, a partner cannot be treated as an employee of the partnership; (ii) income received by a partner for services rendered to the partnership may be considered self-employment income only if the partnership is engaged in a trade or business; and (iii) in this case, the only income received by GMA (and therefore by petitioner) was rental income, which is excluded from self-employment earnings by 42 U.S.C. 411(a)(1) (Pet. App. 36a-37a).

2. a. Petitioner then sought judicial review in the United States District Court for the Eastern District of North Carolina, which granted summary judgment in favor of the Secretary (Pet. App. 4a-16a). Relying on *Zimmermann* v. *Heckler*, 774 F.2d 615, 617 (4th Cir. 1985), the court rejected petitioner's contention that the Appeals Council was without authority to reopen the ALJ's decision on its own motion (Pet. App. 8a). The court ex-

[1] Under 20 C.F.R. 404.988(b), SSA, on the basis of a finding of "good cause," may reopen a decision within four years of the initial determination on the claim for benefits. The four-year period runs from the date of the initial determination even where, as here, the claimant sought review of the initial determination by requesting reconsideration and an ALJ hearing. The standards for finding "good cause" to reopen are contained in 20 C.F.R. 404.989. In this case, the Appeals Council relied on 20 C.F.R. 404.989(a)(3), which provides that good cause will be found if "[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made."

plained that the Secretary's regulations provide for reopening within four years of the initial determination for "good cause," and that in this case there was "good cause" because the ALJ "clearly erred in characterizing the claimant as an 'employee' of GMA" (*ibid.*). On the merits, the district court stated that it was a close question whether petitioner's income from GMA must be excluded as rental income under 42 U.S.C. 411(a)(1) (Pet. App. 11a-14a). But the court found it unnecessary to resolve that question, because offsetting losses from GMA and other partnerships would in any event prevent petitioner from being credited with any *net* self-employment income (and therefore with any quarters of coverage) for 1979 and 1980 (*id.* at 15a).

b. The court of appeals affirmed (Pet. App. 1a-3a; 825 F.2d 408 (Table)), adopting "the sound reasoning of the district court" with respect to both the Appeals Council's reopening authority and petitioner's failure to establish coverage for the years 1979 and 1980 (*id.* at 2a). District Judge Hoffman, sitting by designation, concurred in the panel's ruling on the question of the Appeals Council's reopening authority because he was bound by the Fourth Circuit's prior decision in *Zimmermann*. However, he noted that the First Circuit held in *McCuin* v. *Secretary of Health & Human Services*, 817 F.2d 161 (1987), that only the claimant may request reopening. Pet. App. 3a.

ARGUMENT

The courts below correctly held that the Appeals Council was authorized, on its own motion, to reopen the ALJ's decision finding petitioner entitled to old-age insurance benefits. The majority of the courts of appeals have sustained the Secretary's interpretation of his own regulations to permit reopening on the Secretary's motion as well as on

the motion of the claimant. By contrast, the First Circuit held in *McCuin* that the regulations should be construed to permit only the claimant to request reopening. However, this circuit conflict does not warrant review, because the Secretary has announced his intention to revise the governing regulations to make clear that a decision may be reopened on the Secretary's own motion in appropriate circumstances.

1. Contrary to petitioner's contention (Pet. 10-13), the court of appeals was clearly correct in sustaining the Secretary's interpretation of his own regulations to permit reopening of a decision on the Secretary's motion as well as on the motion of the claimant. This Court has consistently held that judicial deference to administrative determinations is at its height where, as here, the question concerns the interpretation of the agency's own regulations. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Such deference is especially warranted in this case, because the Secretary's interpretation is manifestly reasonable and is supported by the decisions of three other courts of appeals. See *Fox* v. *Bowen*, No. 86-3608 (6th Cir. Dec. 28, 1987), slip op. 6; *Cieutat* v. *Bowen*, 824 F.2d 348, 352-353 (5th Cir. 1987); *Higginbotham* v. *Heckler*, 767 F.2d 408, 410 (8th Cir. 1985); *Munsinger* v. *Schweiker*, 709 F.2d 1212, 1214-1215 (8th Cir. 1983); *Zimmermann* v. *Heckler*, 774 F.2d 615, 617 (4th Cir. 1985). See also *Butterworth* v. *Bowen*, 796 F.2d 1379, 1384-1385 (11th Cir. 1986).

a. The language of the basic reopening regulation does not support petitioner's contention that only the claimant may request reopening. The relevant regulation, 20 C.F.R. 404.988, provides that a determination or decision "may be reopened" within 12 months of the initial deter-

mination for any reason (20 C.F.R. 404.988(a)), within four years for good cause (20 C.F.R. 404.988(b)), and at any time for certain enumerated reasons, such as if the decision was obtained by fraud or fault (20 C.F.R. 404.988(c)). In conferring this authority, Section 404.988 does not refer only to those determinations or decisions that are adverse to the claimant (the ones that claimants presumably would seek to have reopened); it refers without limitation to the reopening of any "determination, revised determination, decision, or revised decision." See *Cieutat*, 824 F.2d at 353. Moreover, some of the conditions for reopening, such as where the prior decision was obtained by fraud (20 C.F.R. 404.988(c)(1)), would almost invariably be invoked *only* by SSA on its own motion. *Fox*, slip op. 7; *Cieutat*, 824 F.2d at 356 n.12; *Munsinger*, 709 F.2d at 1215.

b. Contrary to the view of petitioner (Pet. 12-13) and the First Circuit in *McCuin* (817 F.2d at 174), this interpretation of the basic reopening regulation is not undermined by the preceding regulation, 20 C.F.R. 404.987. Subsection (a) of Section 404.987 informs the claimant that he must seek Appeals Council review of the ALJ's decision within 60 days. But it further states that "a determination or a decision made in your case may be reopened and revised" even after 60 days have passed. As in 20 C.F.R. 404.988, this language is not limited to those determinations and decisions that are adverse to the claimant or to situations in which the claimant might request reopening. Subsection (b) of 20 C.F.R. 404.987 then informs the claimant: "You may ask that a determination or a decision to which you were a party be revised." In *McCuin*, the First Circuit read the reference to "You" as an indication that the Secretary intended to vest the claimant with exclusive control over reopening. See 817 F.2d at 174. But as

the Sixth Circuit has recognized, "[t]he language in the section directed to 'you' was adopted in the 1980 recodification in an effort to make the regulations clearer and easier for public use" (*Fox*, slip op. 7, citing 45 Fed. Reg. 52078 (1980)). This statement of the *claimant's* rights in no way limits the authority of SSA to take action (such as the reopening in this case) that is not dependent upon any action by the claimant.

c. Nor does SSA's authority to *reopen* an ALJ decision render superfluous the provision in 20 C.F.R. 404.969 allowing the Appeals Council to *review* an ALJ decision within 60 days, as suggested by petitioner (Pet. 7, 9, 11, 14) and the First Circuit in *McCuin* (817 F.2d at 169-170). The reopening regulations apply to determinations and decisions rendered at *any* level of the four-stage administrative review process; by contrast, the Appeals Council's authority to review a decision on its own motion within 60 days applies only to decisions that were rendered by an ALJ. Any potential overlap between the two procedures therefore exists for only a small percentage of SSA's decisions. At the initial determination and reconsideration stages, there is no provision for own-motion review by an appellate body like the Appeals Council. Therefore, if SSA's own-motion reopening authority were read out of the regulations, as petitioner proposes, SSA would be deprived of the only means by which it can correct erroneous awards of benefits at the initial determination and reconsideration stages.[2]

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[2] Congress recognized the need for the Secretary to revise determinations rendered at the first two stages of the administrative review process when it enacted the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441. Under the disability programs, a state agency decides at the initial determination and reconsideration stages whether a person is under a disability. 42 U.S.C. 421(a). However, a decision by the state agency that a person is under

Moreover, own-motion reopening authority does not render own-motion review authority meaningless even at the ALJ stage. Direct review and reopening are separate procedural devices that are governed by distinct regulatory provisions and have differing purposes and timetables. The 60-day limitation on Appeals Council review of an ALJ's decision serves to fix the point at which the ALJ's decision becomes final; reopening permits correction of a substantial error in an otherwise final decision. Direct review is a routine procedure; reopening is an extraordinary one. *Cieutat*, 824 F.2d at 355-356 & nn.9-11; *Butterworth*, 796 F.2d at 1385. See also *Califano* v. *Sanders*, 430 U.S. 99, 101-102, 107-109 (1977). The difference between the two procedures is thus analogous to the difference in a civil case between an appeal and a motion for relief from judgment under Fed. R. Civ. P. 60(b). Review and reopening also differ greatly in their practical operation. We have been informed by the Department of Health and Human Services that the Appeals Council currently has the resources to screen only between 5% and 15% of all unappealed ALJ decisions for possible own-motion review within 60 days. This sample approach enables the Appeals Council to exercise some direct supervision and quality control over ALJ decisions within the 60-day period. See *DeLong* v. *Heckler*, 771 F.2d 266, 268

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a disability is actually implemented by SSA, which has the independent responsibility for determining whether the claimant satisfies other criteria (such as being fully insured under Title II) before certifying the claims for payment under 42 U.S.C. 405(i). In Section 304(c) of the 1980 Amendments (94 Stat. 455), Congress directed SSA to review 65% of the state disability determinations in favor of the claimant before those determinations are implemented by SSA. See 42 U.S.C. 421(c)(2) and (3). In addition, Congress made clear in 42 U.S.C. 421(c)(1) that the Secretary may, "on his own motion," review *any* determination by a state agency, either in favor of or adverse to the claimant and either "before or after any action is taken to implement such determination."

(7th Cir. 1985); H.R. Conf. Rep. 96-944, 96th Cong., 2d Sess. 57-58 (1980); S. Rep. 96-408, 96th Cong., 1st Sess. 53 (1979). But it does not foreclose the Appeals Council from thereafter correcting an error in an individual ALJ decision that was not screened for possible review but instead was brought to its attention by another component of SSA that discovered the error in the course of implementing the ALJ's decision, as in this case.

d. An interpretation of the regulations that permitted only a claimant to seek to reopen a prior decision also would introduce anomalies and asymmetry into the regulatory scheme. It is inconceivable, for example, that the Secretary intended to preclude SSA from reopening and revising a decision that the claimant procured by fraud, and yet the logic of petitioner's position would seem to require that conclusion. Similarly, it would be incongruous to suppose that the Secretary intended to afford the claimant a right to have SSA reopen a facially erroneous adverse decision, but to deny SSA the authority to reopen a decision that is favorable to the claimant if it contains a comparably obvious and serious error. That is especially so in light of the fact that a decision finding a claimant eligible for old-age, survivors or disability benefits typically results in monthly payments to the claimant for the indefinite future. There is no reason to believe that the Secretary intended to obligate SSA to perpetuate an error in a determination of entitlement by continuing to pay benefits even after the error has become apparent. Compare Fed. R. Civ. P. 60(b)(5) (providing for relief from judgment when "it is no longer equitable that the judgment should have prospective application").[3]

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[3] For this very reason, when Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, it specifically provided that SSA may terminate benefits if it concludes that the prior finding of disability "was in error" (42 U.S.C.

e. If there could be any remaining doubt regarding the proper construction of the reopening regulations, it is dispelled by the consistent administrative practice for virtually the entire history of the Social Security program. In 1940, the Social Security Board promulgated regulations to establish the four-stage administrative review process that remains in effect to this day. 5 Fed. Reg. 4169-4174. The 1940 regulations also contained a separate subsection providing for reopening and revision of decisions that had been rendered at any of the four stages of review. As relevant here, that subsection provided that "[a]ny decision of a referee or the Appeals Council * * * may be revised by the Appeals Council, either *upon the motion of the Appeals Council* or upon the petition of any party, when it clearly appears that there was an error of fact or law in such decision or that such decision was procured by fraud or misrepresentation" (20 C.F.R. 403.711(b) (emphasis added), as added, 5 Fed. Reg. 4174 (1940)).

This own-motion reopening authority in the 1940 regulation was carried forward over the next four decades. In fact, the First Circuit acknowledged in *McCuin* that "[p]rior to 1980, the regulations clearly gave the Appeals Council the right to reopen on its own initiative after the sixty-day time limit" (817 F.2d at 174, citing 20 C.F.R. 404.956, 404.957 (1978)). The First Circuit also acknowledged in *McCuin* that when the procedural regulations were revised in 1980 to make them more understandable, the Secretary stressed that " 'no substantive changes have been made' " (817 F.2d at 174, quoting 45 Fed. Reg.

(Supp. III) 423(f)(4)). See H.R. Rep. 98-618, 98th Cong., 2d Sess. 12 (1984) ("benefits which were improperly allowed originally should not be continued"). *A fortiori*, the procedural framework does not obligate SSA to pay benefits to an ineligible recipient even where the error is identified before any benefits have been paid.

52078 (1980)). This disclaimer refutes any notion that the current regulations should be construed to have dispensed, sub silentio, with SSA's longstanding authority to reopen decisions on its own motion. See *Fox*, slip op. 7; *Butterworth*, 796 F.2d at 1385.[4]

f. The court of appeals' ruling in this case is consistent with the rulings by three other courts of appeals that the Secretary may reopen an administrative decision on his own motion. See cases cited at page 6, *supra*. The First Circuit reached a contrary conclusion in *McCuin*. However, for a number of reasons, this circuit conflict does not warrant review by the Court at this time:

First, the question presented concerns the interpretation of the Secretary's regulations. There is no suggestion that the Social Security Act itself bars the Secretary from reopening a decision on his own motion. To the contrary, 42 U.S.C. (Supp. III) 405(b)(1), which directs the Secretary to hold hearings upon request, also provides that "[t]he Secretary is further authorized, *on his own motion*, * * * to conduct such investigations and other proceedings as he may deem necessary or proper for the administration

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[4] SSA's intention to retain own-motion reopening authority under the current regulations is evident in other respects as well. For example, the *Office of Hearings and Appeals Handbook* explains that "[i]n certain situations there are equitable reasons for both the claimant and SSA for reopening a determination or decision after it has become 'final and binding' " (*id.* § 1-920). The *OHA Handbook* further states that an ALJ's decision may be reopened and revised by the ALJ on the ALJ's own motion or on the motion of a party and that "[a]n ALJ's decision may also be reopened and revised by the AC [Appeals Council]" (*id.* § 1-925; see also *id.* §§ 1-922-30 and 1-922-31). Moreover, the standard notice that was sent to petitioner informed him that the Appeals Council could review the ALJ's favorable decision on its own motion within 60 days and that even after 60 days the Appeals Council could reopen the decision if, inter alia, there was a clear error on the face of the evidence (Pet. App. 17a-18a).

of [the Act]" (emphasis added). Moreover, 42 U.S.C. 405(a) confers on the Secretary " 'exceptionally broad authority' " to establish implementing procedures, and those regulations must be sustained unless they are arbitrary and capricious. *Bowen* v. *Yuckert,* No. 85-1409 (June 8, 1987), slip op. 6-7 (quoting *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983)). At the very least, the reopening regulations at issue here are not an arbitrary or capricious means for implementing the Secretary's duty under 42 U.S.C. (& Supp. III) 405(b) to conduct investigations and proceedings on his own motion to ensure the "proper" administration of the Act.[5]

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[5] The First Circuit in *McCuin* suggested that due process concerns would be raised in some circumstances if the regulations were construed to permit the Secretary to reopen a decision on his own motion, because that interpretation would deprive administrative decisions of their finality. See 817 F.2d at 171-175. With all respect, we believe that the First Circuit's due process concerns are without merit, at least in the vast majority of cases to which the reopening regulations are applied. The analogous provisions for relief from judgment under Fed. R. Civ. P. 60(b) plainly do not violate the Due Process Clause merely because they may result in the reopening of a judgment that had become "final" when the time for taking an appeal expired. Furthermore, to the extent that the First Circuit was concerned about possible unfairness to a claimant as a result of the reopening of a decision after benefits were paid, any such unfairness may be remedied by waiver of recoupment of overpayments where recovery would defeat the purposes of the Act or "be against equity and good conscience." 42 U.S.C. 404(b). See *Califano* v. *Yamasaki,* 442 U.S. 682 (1979).

In any event, there can be no plausible claim in this case that the Appeals Council's reopening of the ALJ's decision violated petitioner's due process rights, especially since the notice transmitting the ALJ's decision specifically informed him of that possibility. In fact, petitioner does not appear to argue that his due process rights were violated; he merely quotes a passage from the *McCuin* decision that discusses certain due process issues as a general matter. See Pet. 11. It would, moreover, be premature for the Court to address any possible due process issues that could arise from particular applica-

Second, because the question on which the courts of appeals are divided concerns the interpretation of the Secretary's own regulations, that question can be conclusively resolved by the Secretary by amending the regulations, without any need for intervention by this Court. It was for this reason that the Solicitor General, with the concurrence of the Secretary, chose not to ask the Court to review the First Circuit's decision in *McCuin,* even though *McCuin* conflicted with decisions of other courts of appeals and was, in our view, clearly wrong. Instead, as the Sixth Circuit noted in *Fox* v. *Bowen,* the Secretary has formally announced his intention "to revise his regulations to make it clear that the Social Security Administration may reopen a final decision on its own initiative." Slip op. 7, citing 52 Fed. Reg. 14270 (1987); see also *id.* at 40296. When the regulations are revised, the circuit conflict regarding the interpretation of the current regulations will be of no continuing importance.

Third, petitioner was not subjected to any novel or unfair procedure in this case, because the decision below merely sustains the exercise of authority that has existed since 1940 and because petitioner was specifically notified in advance of that authority. The decision in *McCuin,* by contrast, did constitute a marked departure from past practice. The fact that the Secretary chose to forgo petitioning for certiorari in *McCuin*—and therefore chose to tolerate the curtailment of his reopening authority in the First Circuit pending his revision of the governing regulations—does not create any fundamentally unfair disparity in the treatment of claimants in different circuits. That is especially so in light of the discretionary nature of re-

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tions of the reopening regulations in other circumstances, especially in view of the Secretary's plans to revise those regulations.

opening (see *Califano* v. *Sanders*, 430 U.S. at 108) and the availability of other measures for correcting at least some errors even in the First Circuit—*e.g.*, by devoting more resources to screening ALJ decisions for possible own-motion review by the Appeals Council within 60 days, or by terminating benefits on the basis of a *new* decision rather than reopening and revising the original decision.

Fourth, the substantive basis for the reopening in this case likewise was neither unreasonable nor unfair to petitioner. The Appeals Council reopened the ALJ's decision because, as the district court observed, "the ALJ erred as a matter of law in characterizing [petitioner's] income for the years 1978 through 1980 as 'wages' " (Pet. App. 11a). Indeed, petitioner contended before the ALJ that he performed services for GMA not as an employee, but as a self-employed independent contractor (*id.* at 26a). And in 1980, petitioner "characterized his fixed salary as guaranteed payments and included the same in a Schedule K-1 'Partner's Share of Income' form" (*id.* at 11a n.4). Moreover, although petitioner now asserts (Pet. 14-15) that the ALJ's "findings of fact" support the notion that he was an employee of GMA, petitioner does not address the Appeals Council's holding, which was affirmed by the district court and court of appeals, that SSA is foreclosed as a matter of law from treating petitioner as an employee of his partnership. Because petitioner therefore has essentially conceded the correctness of that legal ruling, the effect of the court of appeals' holding on the reopening issue in this case is merely to protect the Secretary's ability to prevent petitioner from receiving old-age insurance benefits to which he is not entitled. That result presents no occasion for this Court to grant review.

g. Petitioner also suggests (Pet. 10, 12) that review is warranted because the decision below conflicts with the Eleventh Circuit's decision in *Butterworth*. However, there, as here, the court rejected the contention that the current regulations prohibit the Secretary from reopening a decision on his own motion. 796 F.2d at 1384-1385. To be sure, the Eleventh Circuit went on to hold in *Butterworth* that any reopening of an ALJ's decision after 60 days must be accomplished by the ALJ, not the Appeals Council. 796 F.2d at 1385-1389. In our view, however, this latter holding was clearly erroneous (see also *Cieutat*, 824 F.2d at 356-357 n.13), because the Appeals Council, from its inception in 1940, has had the authority to reopen an ALJ's decision. See 20 C.F.R. 403.711(b), as added, 5 Fed. Reg. 4174 (1940) (quoted at page 11, *supra*). Indeed, petitioner does not actually argue in favor of the *Butterworth* rule. In any event, the question of *which* component in SSA can exercise the Secretary's reopening authority is even less worthy of review at this time than is the question whether the Secretary has that authority at all under existing regulations. The allocation of reopening authority within SSA (and specifically to the Appeals Council) is a matter to be addressed in the Secretary's intended revision of the reopening regulations. See 52 Fed. Reg. 40296 (1987).

2. Petitioner argues (Pet. 13-14) that even if the Appeals Council is authorized to reopen an ALJ's decision after 60 days, the Appeals Council exceeded its authority in this case because the reopening was based on a determination that the ALJ erred as a matter of law in concluding that petitioner was an employee of GMA from 1978 to 1980. In petitioner's view, errors of law can be corrected only by direct review within 60 days under 20 C.F.R. 404.970(a)(2). However, petitioner's reliance on

that regulation is nothing more than a variant of his basic (albeit erroneous) contention that the Appeals Council's reopening authority is governed by the limitations on its review authority.

The relevant *reopening* regulation, 20 C.F.R. 404.989(a)(3), states that good cause for reopening will be found if an error clearly appears on the face of the evidence. Nothing in that provision suggests that reopening is limited to situations in which the ALJ committed a clear error of fact rather than law. Past administrative practice also refutes such a distinction, because the 1940 version of the reopening regulations expressly provided that a hearing decision could be revised on the Appeals Council's own motion "when it clearly appears that there was an error of fact or law in such decision" (20 C.F.R. 403.711(b), as added, 5 Fed. Reg. 4174 (1940)), and that practice has been followed ever since. See *OHA Handbook* § 1-922-30. Nor would such a distinction make sense: where the undisputed facts render the claimant ineligible under the Act itself, there is no reason to believe that the Secretary nevertheless intended to bind SSA to pay benefits out of the Trust Fund. In any event, petitioner's alternative construction of the reopening authority does not warrant this Court's attention, because it has not been adopted by any court of appeals and it was specifically rejected by the First Circuit in *McCuin* (817 F.2d at 171).[6]

3. Petitioner presents virtually no argument on the merits of the coverage issue. He does state in passing that

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[6] Contrary to petitioner's contention (Pet. 12, 14), the district court in *Call* v. *Heckler*, 647 F. Supp. 560 (D. Mont. 1986), did not hold that errors of law can never support own-motion reopening. The court held only that the Secretary cannot reopen a prior decision on the ground that the ALJ abused his discretion. See 647 F. Supp. at 562.

the ALJ's decision that he was an employee of GMA rested on "findings of fact." See Pet. 14-15. That observation is irrelevant, however, because the Appeals Council set aside the ALJ's decision not on the basis of any disagreement with his factual findings, but because of the ALJ's erroneous *legal* conclusion that a partner in petitioner's position may be treated as an employee of the partnership (Pet. App. 10a). As noted above (see pages 4-5, 15, *supra*), both courts below sustained this ruling by the Appeals Council, and petitioner does not address it here. There accordingly is no occasion for this Court to consider that issue.[7]

4. Finally, petitioner contends (Pet. 16-18) that the courts below should have decided whether he is entitled to quarters of coverage for employment prior to 1951.

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[7] Petitioner also does not challenge the rationale of the Appeals Council's decision after the case was reopened—*i.e.*, that petitioner was ineligible for quarters of coverage as a self-employed independent contractor because the only income derived by GMA (and therefore by petitioner) was rental income from real estate, which is specifically excluded from the definition of self-employment income under 42 U.S.C. 411(a)(1). See Pet. App. 37a. Petitioner does point out (Pet. 15) that the district court did not resolve the rental-income issue and instead affirmed the Appeals Council's decision on the ground that petitioner did not in any event have *net* self-employment income giving rise to covered quarters in 1979 and 1980. See Pet. App. 14a-15a. But petitioner likewise makes no effort to challenge this ruling by the district court. He merely observes (Pet. 15) that this ground for rejecting petitioner's claim was not discussed in the Appeals Council's decision. But it *was* discussed by the ALJ, who found that because of offsetting losses and expenses, petitioner had no net self-employment income if he was an independent contractor from 1978 to 1980 (Pet. App. 27a). The Appeals Council did not overturn that finding. As a result, the courts below did not dispose of the case on a ground that was rejected or not considered in the administrative proceedings. This factbound issue therefore does not warrant further review.

However, petitioner fails to answer the finding by the district court and court of appeals that this issue was not properly preserved in administrative proceedings (Pet. App. 2a-3a, 9a n.3). Moreover, as the district court observed, it makes no difference for present purposes whether petitioner should be credited with nine quarters of coverage for pre-1951 employment, because the exclusion of the eight quarters for 1979 and 1980 renders him ineligible for old-age insurance benefits in any event (Pet. App. 9a-10a n.3). Finally, the court of appeals made clear that its decision does not foreclose petitioner from seeking correction of his earnings records for years prior to 1951, pursuant to 42 U.S.C. (& Supp. III) 405(c) (Pet. App. 3a). Especially in the absence of any ruling by the courts below, petitioner's claims concerning his employment prior to 1951 do not warrant review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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